

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. STERN and B. FLEISCHER, Partners Doing
Business Under the Firm Name and Style of
J. STERN & COMPANY,

Appellants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS B.
FERNANDEZ, Executrix and Executor of
the Last Will and Testament of B. FERNAN-
DEZ, Deceased,

Appellees.

Apostles.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

Filed

JUL - 1 1914

F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Title of Court and Cause.]

Praecipe for Apostles on Appeal.

To the Clerk of the District Court of the United States, in and for the Northern District of California, First Division:

You will please prepare Apostles on Appeal in the cause above entitled, in pursuance of and in accordance with the requirements of Rule 4, sec. 1, of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit, and append your certificate thereto, as required by Rule 5 of said Rules.

Dated February 20, 1914.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelants.

[Endorsed]: Filed Feb. 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

[Title of Court and Cause.]

Statement of Clerk U. S. District Court.

PARTIES.

LIBELANTS: J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern and Company.

RESPONDENTS: B. Fernandez (Original Respondent) and Thomas B. Fernandez and Carlotta C. Fernandez (Substituted Respondents).

*Page-number appearing at foot of page of original certified Record.

PROCTORS

for

LIBELANTS: Messrs. Frank and Mansfield (Original Proctors), Nathan H. Frank, Esquire, and Irving H. Frank, Esquire (Proctors perfecting appeal), San Francisco, California. [2]

RESPONDENT: H. W. Hutton, Esquire, San Francisco, California.

PROCEEDINGS.

1905.

November 13. Filed verified Libel.

Issued Citation for the appearance of respondent, etc., and which said Citation was afterwards on the 28th day of November, 1905, returned and filed with the following return of the United States Marshal, endorsed thereon: "The within Writ is returned unexecuted as no instructions were given to the United States Marshal by Proctors for Libelant on whom to serve the process or where the parties could be found, and no deposit to cover costs were made to the Marshal, as required by the United States Attorney General, before service of process.

JOHN H. SHINE,

United States Marshal.

By A. L. Farish,

Chief Office Deputy.

San Francisco, Cal., Nov., 28, 1905."

December 9. Filed Respondent's Exceptions to Libel.

1912.

October 8. Filed Notice of and Motion for Substitution of Respondent and to Dismiss Libel. [3]

October 14. A hearing was this day had on the Motion to Substitute Respondent and to Dismiss Libel in the District Court of the United States, for the Northern District of California, First Division. The Honorable John J. De Haven, Judge, presiding, after hearing the respective parties, the matter was submitted to the Court.

November 8. Filed Opinion, granting motion to substitute defendants and denying motion to dismiss.

November 11. A hearing was this day had on the exceptions to the Libel, in the said District Court, the Honorable John J. De Haven presiding, and after hearing counsel for the respective parties, the Court ordered said exceptions overruled.

November 25. Filed Answer of Respondent.

1913.

February 6. The Court (Frank S. Dietrich, Judge, presiding) this day ordered the matter referred to United

States Commissioner, Francis Krull, to take the testimony offered and report the same to the Court.

September 22. The above-entitled case this day came on for trial in the said District Court, before the Honorable M. T. Dooling, Judge, and after hearing, etc., the case was argued and submitted. [4]

October 27. Filed notice of and motion for the setting aside of submission of this case and reopened for the purpose of allowing respondent to make additional proofs.

November 1. A hearing was this day had in said court (M. T. Dooling, Judge, presiding) on the motion to set aside submission and reopen the case, and after hearing the respective parties, the Court granted said motion, etc.

Filed Amended Libel.

December 5. Filed Opinion in favor of respondents.

December 15. Filed Decree.
1914.

February 20. Filed Notice of Appeal.

February 26. Filed two volumes of testimony taken in open court.

February 27. Filed one volume of testimony

taken before United States Commissioner.

February 28. Filed Bond on Appeal and Supersedeas in the sum of \$500.00, with S. J. Newman and A. L. Frank, as sureties.

April 20. Filed Assignment of Errors. [5]

UNITED STATES OF AMERICA.

District Court of the United States of America, for the Northern District of California.

IN ADMIRALTY.

J. STERN and B. FLEISCHER, Partners Doing Business Under the Firm Name and Style of J. STERN & CO.,

Libelants,

vs.

B. FERNANDEZ,

Respondent.

Libel.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California:

THE LIBEL OF

J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Co., against the respondent, B. Fernandez, and against all persons lawfully intervening for *for* their interest therein, in a cause of contract civil and maritime, alleges: [6]

I.

That at all the times hereinafter mentioned the said libelants, J. Stern and B. Fleischer, were and still are co-partners doing business in the City and County of San Francisco, State of California, and in Rio Vista, County of Solano, in said State, under the firm name and style of J. Stern & Co.

II.

That heretofore, to wit, on the 17th day of October, 1904, the said libelants shipped on board the schooner "Francis E. M. Bernard," then lying in the Sacramento River, in said State of California, and bound on the voyage to the port of San Francisco, in said State, in good order and well conditioned, to be carried and transported in said schooner to said port of San Francisco, and delivered to the said libelants in like good order and condition, one thousand and eight (1,008) sacks of beans, which said merchandise the master of said vessel then and there received on board and promised and agreed to transport, as aforesaid, to the said port of San Francisco and there deliver in like good order and condition to said libelants.

III

That said schooner proceeded with said merchandise on board bound for said port of San Francisco, and notwithstanding these libelants have been at all times ready and willing, and still are ready and willing, to receive said merchandise in good order, and upon receiving the same to pay the freight thereon, yet the said master has not delivered the same, nor any part thereof to said libelants; but, on the contrary, owing to the unseaworthy condition of said

vessel, and to the insufficient manning thereof, and to the negligence and carelessness of the said respondent, the said merchandise was on the 17th day of October, 1904, totally lost and destroyed, whereby the said [7] libelants have suffered damage in the sum of Two Thousand Three Hundred and Seventy-seven and 5/100 (2,377.05) Dollars.

IV.

That the said libelants have requested the said respondent to make good their said loss and damage, and to pay the said sum of Two Thousand Three Hundred and Seventy-seven and 5/100 (2,377.05) Dollars, but the said respondent has refused, and still continues to refuse, to pay the same, or any part thereof.

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, said libelants pray that a monition in due form of law, according to the practice and course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against said B. Fernandez, and that he may be cited to appear and answer upon oath all and singular the premises aforesaid; that this Honorable Court will be pleased to decree the payment of the amount due to said libelants, as aforesaid, together with interest from said 17th day of October, 1904, and costs of suit; and that said libelants may have such other and

further relief as in law and justice they may be entitled to receive.

J. STERN & CO.

By J. STERN.

Northern District of California,—ss.

Sworn to before me this 13th day of November,
A. D. 1905.

[Seal]

J. S. MANLEY,

Deputy Clerk U. S. District Court, Northern District
of California [8]

FRANK and MANSFIELD,

Proctors for Libelants.

[Endorsed]: Filed Nov. 13, 1905. J. P. Brown,
Clerk. By J. S. Manley, Deputy Clerk. [9]

[Title of Court and Cause.]

Exceptions to Libel.

To the Honorable J. J. DE HAVEN, Judge of said
Court.

Defendant in said cause excepts to the libel of J.
Stern and B. Fleischer, libelants, on the following
grounds, to wit:

I.

For that the said libel is not sufficiently specific in
this, that it cannot be ascertained therefrom in what
particulars the said schooner "Francis E. M. Ber-
nard" was unseaworthy, and what caused her unsea-
worthiness.

II.

For that it cannot be ascertained from the face of
said libel in what particulars the said "Francis E.

M. Bernard'' was insufficiently manned.

III.

For that it cannot be ascertained therefrom in what particulars or how the defendant herein was negligent or careless in carrying the merchandise mentioned in said libel.

WHEREFORE, said respondent prays that these exceptions may be sustained and the said libel dismissed.

H. W. HUTTON,

Proctor for Respondent. [10]

Service admitted this 8th day of Dec. 1905.

FRANK and MANSFIELD,

Proctors for Libellant.

[Endorsed]: Filed Dec. 9, 1905. Jas. P. Brown,
Clerk. By John Fougá, Deputy Clerk. [11]

[Notice of Motion for Substitution of Parties Respondent and of Motion to Dismiss Action.]

[Title of Court and Cause.]

The libellants above named and their proctors will please take notice that Thomas B. Fernandez and Carlotta C. Fernandez, the executor and executrix of the last will of B. Fernandez, the above-named defendant, now deceased, will move the above court at the courtroom thereof, United States Post-office and Courtroom Building, in the City and County of San Francisco, State of California, on Saturday, the 12th day of October, 1912, at the hour of ten o'clock, in the forenoon of that day or as soon thereafter as counsel can be heard for an order of

said Court, substituting the said Thomas B. Fernandez and the said Carlotta C. Fernandez, the defendants in said cause, in the place and stead of B. Fernandez, and at said time and place they will further move the said Court to dismiss the above-entitled action.

Said motions will be made upon the following grounds, to wit, that said B. Fernandez, the defendant above named, is now dead, and the said Thomas B. Fernandez is the executor and the said Carlotta C. Fernandez is the executrix of the last will and testament of said B. Fernandez, deceased, and that the above-entitled action has not been prosecuted by the libellants with reasonable or any diligence or at all, that owing to the death of said B. Fernandez, the said executor and executrix will be unable to properly prepare for a defense to said action, and by reason of the laches of the [12] libellants in not bringing the said cause on for trial upon the exceptions to the libel, and having the said cause brought to an issue and tried, the estate of the said B. Fernandez will suffer great damage if said cause is not dismissed.

On the hearing of said motions, said Thomas B. Fernandez and said Carlotta C. Fernandez will read this notice of motion, the papers and files herein, and the affidavits of H. W. Hutton and Thomas B. Fernandez, copies of which are attached hereto and served herewith to the libellants above named and

to Messrs. Frank and Mansfield, their proctors.

Yours, etc.

H. W. HUTTON,

Proctor for Thomas B. Fernandez and Carlotta C.
Fernandez. [13]

[**Affidavit of H. W. Hutton.**]

[Title of Court and Cause.]

State of California,

City and County of San Francisco,—ss.

H. W. Hutton, being first duly sworn, deposes and says as follows:

I am an attorney at law and have been for many years last past; the libel in the above cause was filed in the above court on the 13th day of November, 1905, and process issued thereon.

Having some knowledge of the claim made by the libellants against the defendant in a conversation with him, the said defendant, I advised him to appear therein without service of process, and thereupon and on the 8th day of December, 1905, I served exceptions to the libel for and on behalf of said defendant upon Messrs. Frank & Mansfield, the proctors for the libellants; on the 8th day of said December, I filed the exceptions above mentioned with the clerk of this Court, and upon said day the defendant gave a bond for costs and paid the clerk a deposit of \$15.00; since that day nothing has been done in said cause. I have never at any time requested any delay or any postponement of any matters [14] connected with the said cause or in said cause, nor has the defendant requested any post-

ponement of any matter connected therewith.

H. W. HUTTON.

Subscribed and sworn to before me this 2d day of October, 1912.

[Seal]

L. H. ANDERSON,

Notary Public in and for the City and County of
San Francisco, State of California. [15]

[Affidavit of Thomas B. Fernandez.]

[Title of Court and Cause.]

State of California,

County of Contra Costa,—ss.

Thomas B. Fernandez, being first duly sworn,
deposes and says as follows:

B. Fernandez, the above-named defendant, died testate, in the county of Contra Costa, State of California, on the 12th day of May, 1912; he was a resident of said county at the time of his death and had been such resident for more than forty years prior thereto.

After his death, his last will and testament was presented with a proper petition to the Superior Court of the said State of California, in and for the said County of Contra Costa, for probate, and thereafter such proceedings were had in said court upon said will and petition, that on the 3d day of June, 1912, the said [16] Superior Court, by its order duly given and made, admitted the said will to probate, and appointed myself as the executor and Carlotta C. Fernandez as the executrix of the said last will and testament of the said B. Fernandez, deceased; that thereupon and upon the same day I

qualified as such executor, and the said Carlotta C. Fernandez qualified as such executrix, and I thereupon became, ever since have been and now am the regularly appointed, qualified and acting executor, and the said Carlotta C. Fernandez thereupon and on the said 3d day of June, 1912, became the regularly appointed, qualified and ever since has been and now is the executrix of the last will and testament of said B. Fernandez, deceased.

That neither myself nor the said executrix had any knowledge of the pendency of the above cause until some time ago after our appointment, when we were told by W. S. Tinning, Esquire, our attorney in the said estate, that he had been informed by a letter from Mr. H. W. Hutton that such a case was pending.

I have no knowledge of the facts of said case, nor do I know where the witnesses are, nor have I any knowledge or information upon which to prepare a defense thereto, my belief being that the whole of the facts and information necessary to prepare a defense to said action were in the possession of the defendant alone at the time of his death, and my belief is that the said executrix of said estate is similarly situated.

THOMAS B. FERNANDEZ.

Subscribed and sworn to before me this 7th day of October, 1912.

[Seal]

L. E. HART,
Notary Public in and for the County of Contra
Costa, State of California.

[Endorsed]: Filed Oct. 8, 1912. At 9 o'clock and 55 min. A. M. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [17]

**[Order of Submission of Motions for Substitution
and to Dismiss.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 14th day of October, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,495.

STERN et al.

vs.

FERNANDEZ.

The motion to substitute defendants and to dismiss this proceeding this day came on for hearing, H. W. Hutton, Esqr., appearing for respondent, and N. A. Frank, Esqr., opposing, and after hearing counsel, by the Court ordered that said motions stand submitted. [18]

[**Opinion on Motion for Substitution of Parties
Respondent and on Motion to Dismiss Libel.**]

[Title of Court and Cause.]

NATHAN H. FRANK and IRVING H.

FRANK, Proctors for Libelant.

H. W. HUTTON, Proctor for Respondent.

DE HAVEN, District Judge.

This is a motion to substitute the executors as defendants, in place of the original defendant, who is deceased, and then for a dismissal of the libel, upon the ground of the unreasonable delay of libelant in prosecuting the action. The delay on the part of the libelant has certainly been great, but in view of the fact that the defendant at all times prior to the date of his decease on May 12, 1912, had the right to put an end to the delay by himself noticing the cause for hearing, he must be deemed to have acquiesced in such delay, and under the rule declared in the case of "*The Mariel*," 6 Fed. Rep. 831, his *representative* are not entitled to have the libel dismissed for want of prosecution. [19]

THE MOTION FOR SUBSTITUTION WILL BE GRANTED, and that for the DISMISSAL OF THE LIBEL WILL BE DENIED.

The hearing upon the exceptions to the libel will be set for Monday, November the 11th, 1912.

[Endorsed]: Filed Nov. 8th, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[20]

[Title of Court and Cause.]

Notice of Hearing of Exceptions to Libel.

To the Respondent Above Named, and to H. W. Hutton, Esq., Proctor for Respondent:

PLEASE TAKE NOTICE, that the exceptions to the libel on file in the above-entitled cause have been set down for hearing for Friday, the 11th day of October, 1912, at the hour of 10 o'clock, A. M. of said day.

Dated October 7, 1912.

FRANK & MANSFIELD,
NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelant. [21]

The within Notice of Hearing Exceptions to Libel served upon H. W. Hutton, at his office, Pacific Bldg., San Francisco, this 7th day of Oct. 1912, by leaving a copy thereof at the office of said H. W. Hutton.

IRVING H. FRANK,
Attorney for Respondent.

[Endorsed]: Filed Oct. 9, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the Court-room thereof, in the City and County of San Francisco, on Monday, the 11th day of Novem-

ber, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

#13,495.

STERN et al.

vs.

FERNANDEZ.

Order Overruling Exceptions to Libel.

The exceptions to the libel herein this day came on for hearing, and after hearing H. W. Hutton, Esq., in support thereof, and N. A. Frank, Esqr., in opposition thereto, by the Court ordered that said exceptions be, and the same are hereby overruled. Further ordered that defendant have 15 days to answer said libel. [23]

[Title of Court and Cause.]

Answer.

To the Honorable J. J. DE HAVEN, Judge of the Above-entitled Court:

The answer of Carlotta C. Fernandez, the executrix, and Thomas B. Fernandez, the executor of the last will and testament of Bernardo Fernandez, named in libellants' libel as B. Fernandez, to the libel of said libellants respectfully shows and alleges as follows:

I.

That Bernardo Fernandez, named in libellants' libel as B. Fernandez, died testate, in the county of Contra Costa, State of California, on or about the 12th day of May, 1912, of which county he was a resi-

dent at the time of his death, that thereafter said Carlotta C. Fernandez, and said Thomas B. Fernandez, offered the last will and testament of said Bernardo Fernandez to the Superior Court of the State of California, in and for the county of Contra Costa for probate, the said court being a court of competent jurisdiction, together with a petition praying that the said Carlotta C. Fernandez, be appointed the executrix, and the said Thomas B. Fernandez be appointed the executor of the said last will and testament of said deceased, they being named as such in said will; that thereafter such proceedings were had upon said will and petition that on the 3d day of June, 1912, the said will was by order of said Court duly given and made, admitted to [24] probate, and the said Carlotta C. Fernandez appointed the executrix, and the said Thomas B. Fernandez was appointed the executor thereof, and thereafter and on said day they each qualified in such capacities, and the said Carlotta C. Fernandez thereupon became, ever since has been, and now is the executrix, and the said Thomas B. Fernandez thereupon became, ever since has been, and now is the executor of the last will and testament of said Bernardo Fernandez, deceased.

II.

Answering unto the allegations and matter contained in the first article in libellants' libel contained, the said Carlotta C. and Thomas B. Fernandez, and each thereof, allege that they nor either thereof have any information, belief or knowledge upon any of said matters or allegations and they therefore call for

proof thereof, and basing the following denials upon want of information and belief, the said Carlotta C. and Thomas B. Fernandez, and each thereof, deny, that on the 17th day of October, 1904, or upon any other day, or at all, that the libellants or either thereof, shipped on board the schooner "Francis E. M. Barnard," or any other schooner, one thousand and eight or any sacks of beans or anything else, and upon like ground they and each thereof deny that on said or any other day the said schooner was lying in the Sacramento River, in the State of California, or that said schooner was bound to the Port of San Francisco, or elsewhere; upon like grounds they and each thereof deny that said beans or any other merchandise shipped by them was either in good order or well conditioned; upon like grounds they and each thereof deny that said beans or any thereof, or anything else, was to be carried to the port of San Francisco, or elsewhere, or delivered to the libellants, [25] or either thereof at said San Francisco, or elsewhere; upon like grounds they and each thereof deny that the said sacks of beans, or any thereof, or any merchandise was received by the master of said vessel on board thereof, or that the same or any thereof was received by anyone else on board of said vessel; upon like grounds they and each thereof deny that the said master of said vessel or anyone else either promised and agreed or promised or agreed to transport the said beans or any thereof, or any other merchandise, to the said port of San Francisco, or elsewhere, or to deliver the same or any thereof at said or any place, in like or any good order and con-

dition, or like or any good order or condition to said libellants or to anyone else, at said San Francisco, or elsewhere.

III.

Answering unto the allegations and matters contained in Article III of libellants' libel, the said Carlotta C. and Thomas B. Fernandez, and each thereof, allege that they nor either thereof have any knowledge, information or belief as to any of the matters contained in said article, and they therefore call for proof of said matters and allegations.

IV.

Further answering, the said Carlotta C. and Thomas B. Fernandez allege that they have neither information or belief sufficient to enable them or either thereof to answer the allegations contained in the III article in said libel contained, and basing their denials upon those grounds, they and each thereof deny that said schooner proceeded with said or any merchandise on board bound for said port of San Francisco, or elsewhere; they deny that libellants or either thereof were at all or any of the times mentioned in said libel, ready and willing, or ready or willing, to receive [26] said or any merchandise, or any thereof, in good or any order; they deny that said libellants, or either thereof, were ever ready to pay the freight on said or any merchandise; they deny that the master of said schooner did not deliver the said merchandise to libellants or either thereof; they deny that the said master did not deliver any part of said merchandise to libellants; they deny that owing to the unseaworthy condition of said vessel,

or the insufficient manning thereof, or to the negligence and carelessness or negligence or carelessness of said Bernardo Fernandez, that the said merchandise, or any thereof, was, on the 17th day of October, 1904, or upon any other day, or at all, either totally or partially lost and destroyed, or totally or partially lost or destroyed; upon like grounds they and each thereof deny that the libellants, or either thereof, by reason of any of the matters and things set forth in libellants' libel, have or did suffer damage in the sum of two thousand three hundred and *seven*-seven and 5/100 (2,377.05) dollars, or in any other sum, or any damage at all.

V.

That said Carlotta C. and Thomas B. Fernandez, and each thereof, further allege that they or either thereof have any knowledge, information or belief of the allegations and matters contained in Article IV of libellants' libel, and they and each thereof therefore call for proof of said allegations and matters.

VI.

They admit the jurisdiction of this Honorable Court in the premises, but they and each thereof deny that the premises contained in libellants' libel are true. [27]

VII.

Further answering said libel, the said Carlotta C. and Thomas B. Fernandez and each thereof allege, that as they are informed and believe, and on information and belief allege, that said schooner "Frances E. M. Bernard," on all of the dates and times in libellants' libel mentioned, was strong, tight, staunch,

well and properly found, and manned and loaded, and that the loss and damage mentioned in said libel, if any such loss and damage there was, occurred without the privity or fault of said Bernardo Fernandez, or of anyone in his employ, but was caused and occasioned solely by a peril of the sea, and an accident of navigation, and on like information and belief they and each allege that the said schooner "Frances E. M. Bernard" sank at some place unknown to them and each thereof, in some waters tributary to the Bay of San Francisco, on or about the dates and times mentioned in said libel; that at the time she so sank, and at the conclusion of such disaster, the value of said schooner, with her tackle, apparel and furniture, boats and sails, as she lay at the bottom of the waters in which she sank, did not exceed the sum of fifty (\$50.00) dollars, and there was no freight pending, and said Bernardo Fernandez never at any time received any freight for said voyage nor will these defendants ever receive any such freight.

VIII.

Further answering said libel, the said Carlotta C. and Thomas B. Fernandez, on their and each of their information and belief, allege that on all of the dates and times mentioned in libellants' libel, the said schooner "Frances E. M. Bernard" was in all respects seaworthy and properly manned, equipped, and supplied, and that the loss and damage mentioned in said [28] libel, if any such loss and damage there was, resulted from faults or errors in navigation of said vessel, or in the management of said vessel, or arose from dangers of the sea and the navi-

gable waters upon which said vessel was operated.

Wherefore, having fully answered, the said Carlotta C. and Thomas B. Fernandez, substituted defendants herein, as executrix and executor of the last will and testament of Bernardo Fernandez, deceased, pray that libellants' libel may be dismissed, with costs.

H. W. HUTTON,

Proctor for Respondents.

CARLOTTA C. FERNANDEZ.

THOMAS B. FERNANDEZ. [29]

State of California,

County of Contra Costa,—ss.

Thomas B. Fernandez, being first duly sworn, deposes and says as follows:

I am one of the substituted defendants in the above-entitled cause; I have read the foregoing answer and I know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information or belief, and as to those matters I believe it to be true.

THOMAS B. FERNANDEZ.

Subscribed and sworn to before me this 23d day of November, 1912.

[Seal]

L. E. HART,

Notary Public in and for the County of Contra Costa, State of California.

[Endorsed]: Filed Nov. 25, 1912. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [30]

**[Order Referring Cause to U. S. Commissioner to
Take Testimony.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 6th day of February, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable FRANK S. DIETRICH, Judge.

#13,495.

STERN & CO.

vs.

FERNANDEZ.

By the Court ordered that this cause be and the same is hereby referred to Francis Krull, U. S. Commissioner, to take the testimony that may be offered before him by the parties and report the same to this court. [31]

[Record of Hearing—Monday, September 22, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 22d day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#13,495.

J. STERN & COMPANY

vs.

B. FERNANDEZ et al.

This cause, this day came on for hearing, N. A. Frank, Esqr., appearing for libellant, and H. W. Hutton, Esqr., appearing for respondent. Mr. Frank stated case and called Benedict Fleisher, who was duly sworn and examined on behalf of libelant. Mr. Hutton called B. H. Tiejn, P. H. Sommer, Thomas B. Fernandez, who were each duly sworn and examined as witnesses on behalf of respondents, and introduced in evidence the depositions taken before the United States Commissioner. Mr. Hutton recalled B. H. Tietjen. Mr. Frank called John Erickson, who was sworn and examined on behalf of libellant. The cause was then argued and submitted to the Court for decision. [32]

[Title of Court and Cause.]

Honorable MAURICE T. DOOLING, Judge.

Testimony Taken in Open Court.

Monday, September 22, 1913.

COUNSEL APPEARING:

For the Libelants: H. W. HUTTON, Esq.

For the Respondent: NATHAN H. FRANK,
Esq.

[Statement of Case by Mr. Nathan H. Frank,
Proctor for the Respondent.]

Mr. FRANK.—This is an action for damages for

the loss of a cargo of beans shipped on the schooner "Francis E. M. Bernard" from a point on Miner Slough, near the Sacramento River, bound to San Francisco. The complaint alleges the shipping of the beans, the loss of the cargo and the damages.

The answer sets up the death of the respondent and the appointment of an executrix and executor. It also alleges ignorance of the allegations of the libel and sets up two separate defenses: First, what is known as the Harter Act, and the second, a limitation of liability under the statutes providing to that effect.

I desire at this time to ask permission to amend the libel by alleging the facts the same as in the answer, the [33] decease and the substitution of the executor and executrix, and also the presentation and rejection of the claim in this case. I presume there will be no objection to that.

Mr. HUTTON.—What is that?

Mr. FRANK.—The substitution.

Mr. HUTTON.—That has been granted.

Mr. FRANK.—I desire to make the proper allegation in the libel, and also the presentation and rejection of the claim.

Mr. HUTTON.—We would have the right to answer it, your Honor.

Mr. FRANK.—We will assume that it is denied, Mr. Hutton.

Mr. HUTTON.—I want to answer a libel. I don't want to answer a statement. I have a right to put in a proper written answer to the libel. The admission made may get in the record and it may

not. Of course, Mr. Frank has an absolute right to amend his libel. Amendments are made with great liberality in admiralty courts.

Mr. FRANK.—I have no objection to that.

The COURT.—Very well. Have you your amendment prepared?

Mr. FRANK.—I have not it prepared. I will file it later. The gentlemen is apprised of the matter.

The COURT.—The only new matter is the presentation of the claim.

Mr. FRANK.—Yes.

Mr. HUTTON.—I will state here—and I think we can agree on it, it may be agreed, so far as I am concerned, that the libelant did within proper time present a claim under the laws of the State of California to the executor and executrix and that it has been rejected practically by lapse of time.

Mr. FRANK.—That is all I want.

Mr. HUTTON.—And I suppose it may be admitted that the [34] original defendant, Bernardo Fernandez, is dead, and that the substituted defendants were regularly appointed executor and executrix of the last will, and that they are still such.

Mr. FRANK.—Yes, that is all right.

[Testimony of Benedict Fleischer, for Libelants.]

BENEDICT FLEISCHER, called for the libelants, sworn.

Mr. FRANK.—Q. You are one of the libelants in this case? A. Yes, sir.

Q. And a member of the firm of J. Stern & Co.?

A. Yes, sir.

Q. Do you remember the shipment of beans in

(Testimony of Benedict Fleischer.)

question on board the "Frances E. M. Bernard"?

A. I do.

Q. How many sacks of beans were placed on board the vessel?

A. 337 in one lot and 671 in another lot.

Q. Were those beans ever delivered by the vessel?

A. They were delivered on board of the vessel.

Q. I mean delivered by the vessel in San Francisco, the port of delivery? A. No, sir.

Q. Your information is that they were lost?

A. They were lost.

Q. What was the market value of those beans at that time, at the port of San Francisco?

A. We had them sold on the basis of bank delivery f. o. b. landing, \$2.35 per hundred.

Q. That is, that would have been their market price—by "bank" delivery you mean what?

A. At the shipping point.

The COURT.—What would that be at the point of delivery?

Mr. FRANK.—I assume the freight would be added. If we added the freight, we would have to subtract it anyhow because the respondent would be entitled to the freight; so that makes it net instead of going through that process. It would be worth more at the point of delivery than at the point of shipment. §[35]

The COURT.—It might, well, be worth more but whether you can conclusively say it would be worth more or worth less—the point here is, that it was at the point of delivery.

(Testimony of Benedict Fleischer.)

Mr. FRANK.—Well, *prima facie* at any rate that would be the condition; it would be worth what it was worth there plus the cost of transportation.

Q. Was there a different market rate at San Francisco?

A. Yes, they were considerably higher in San Francisco.

Q. They were considerably higher?

A. Yes, sir.

Q. What was the value then in San Francisco?

A. About \$2.55, as near as I can recollect.

Q. You say per hundred; how many pounds were there in a sack?

A. They averaged about 85 pounds to the sack.

Q. 85 pounds to the sack? A. Yes, sir.

Mr. FRANK.—That is all. Take the witness.

Cross-examination.

Mr. HUTTON.—Q. Who is Mr. Stern?

A. Mr. Stern is my partner; he is here present.

Q. The firm of J. Stern & Company does not exist at this time, does it?

A. We have since incorporated. It still exists. The partnership does not exist any more. We incorporated since.

Q. All the claims of the partnership were assigned to the corporation?

A. No, sir; it was a partnership at that time.

Q. You did not see these beans loaded on the schooner, did you? A. I did not.

Q. Where were you at the time that you claim they were loaded?

(Testimony of Benedict Fleischer.)

A. I was in Rio Vista at the time.

Q. These beans were not loaded at Rio Vista?

A. They were not loaded at Rio Vista; no.

Q. What knowledge have you of the weights; you did not weigh them yourself, did you?

A. No, sir. [36]

Q. And you did not count the sacks yourself?

A. No, sir.

Q. You have no personal knowledge as to the weights that were in the sack, or that each sack contained, or the number of sacks? A. I have not.

Q. When you state that the value was such and such at the shipping point, what do you base that on?

A. We had them contracted at \$2.35, f. o. b. landing, on the basis of f. o. b. landing, to Erlanger & Gallinger, a firm that is out of business now.

Q. You did not raise these beans yourself, did you? A. No, sir.

Mr. HUTTON.—That is all. I do not think this witness has shown any knowledge—

Mr. FRANK.—One moment; we have not finished yet.

Redirect Examination.

Mr. FRANK.—Q. Did you receive a shipping receipt for those beans? A. Yes, sir.

Q. A shipping receipt from the vessel?

A. From the Japanese.

Q. But it was signed by the master of the vessel?

A. Yes, sir.

Q. And the weights you have given are those weights taken from those shipping receipts?

(Testimony of Benedict Fleischer.)

A. No, sir; we had to average them the same as other beans were weighed that season.

Q. I don't mean the weight; I mean the number of sacks?

A. The number of sacks were taken from the shipping receipts; yes, sir.

Q. And these papers that I hand you are what?

A. That is a receipt made out by me and signed by the Jap who sold the beans.

Q. At the time of the presentation of the shipping receipt? A. Yes.

Q. And the number of sacks correspond with the number of sacks [37] shown by the shipping receipts? A. Yes, sir.

Mr. HUTTON.—I will have to object to this, if your Honor please, on the ground that it is without foundation and that it is hearsay. It is not signed by anyone we are connected with, either by the master or by the defendant. They are simply signed by a Jap.

Mr. FRANK.—I am not offering it in evidence for that purpose; I am simply connecting up the number of sacks.

The COURT.—Q. Where are the shipping receipts?

A. The shipping receipts were lost in the fire; we sent them to Mr. Frank and they were lost.

Q. Who is this Jap who signed them, what connection did he have with the transaction?

A. He was farming and he sold us the beans; he was the owner of the beans before we bought them;

(Testimony of Benedict Fleischer.)

in other words, he raised the beans.

Mr. FRANK.—I offer these two receipts in evidence for the purpose of connecting them up with the bills of lading showing the number of sacks that were delivered on board, and for that purpose only.

Mr. HUTTON.—We object upon the ground that it is without foundation and hearsay and not binding on the defendants, the original defendants or the substituted defendants.

The COURT.—I think the objection will have to be sustained. The only purpose of them is to refresh his memory. He has testified that he had 337 sacks and 671 sacks. This would not add anything to it. It might subtract from the case after it was all over.

Mr. FRANK.—Well, I don't care particularly to offer these in evidence. I simply wish them for the purpose of refreshing the witness' memory and to show the connection between the shipping receipts. However, I withdraw it if that is your [38] Honor's ruling.

Mr. HUTTON.—A witness can only refresh his memory by a paper that is either made by himself or under his immediate direction. This paper was not made either way.

Mr. FRANK.—Yes, it was.

Q. Was that written by yourself, in your own handwriting? A. Yes, it was written by myself.

The COURT.—Q. You saw the shipping receipts, did you? A. Yes, sir.

Q. Did they correspond with the number of sacks

(Testimony of Benedict Fleischer.)

mentioned here? A. Yes, sir.

Mr. HUTTON.—I object to the shipping receipt upon the ground that there is no proof here that they were ever signed by the master of the vessel.

The COURT.—He says they were, and that they were lost, that they were burned up.

Mr. FRANK.—That is all.

Recross-examination.

Mr. HUTTON.—Q. Did you ever see the master of the vessel sign any shipping receipt?

A. No, sir.

Q. And all you know is you got a paper with the name on it that someone told you was the name of the master of the vessel? A. Well, we always—

Q. (Intg.) I am not asking you about always, I am asking you about the shipping receipt. I will ask you, how did you get that shipping receipt that you say was burned?

A. The Japanese brought it in and he got his money.

Q. Brought it in where?

A. In our store at Rio Vista.

Q. And that was the first time you saw it?

A. That was the first time I saw it. [39]

Q. Was it kept with these two papers that you looked at awhile ago? A. No, sir.

Q. Where was it taken to?

A. The shipping receipt?

Q. Yes. A. I mailed them to San Francisco.

Mr. HUTTON.—I move to strike out all the tes-

timony of the witness relating to this shipping receipt or alleged shipping receipt upon the ground that no connection is shown between it and the defendant.

The COURT.—The motion will be denied.

Mr. HUTTON.—That is all.

Mr. FRANK.—That is our *prima facie* case, your Honor.

The COURT.—Is that your case, Mr. Frank?

Mr. FRANK.—That is our *prima facie* case.

[Testimony of B. H. Tietjan, for Respondent.]

B. H. TIETJAN, called for the respondent, sworn.

Mr. HUTTON.—Our defense in this case, if your Honor please, assuming that they have established the fact that the beans were received by the original defendant, is that if they were lost they were lost without fault of anyone, of course, our contention is that the libelant would have to show want of ordinary care. And again, if your Honor please, the Harter Act is pleaded. We contend that the vessel was tight, strong, sufficiently and properly manned and that that absolves the owner of the vessel by reason of errors of navigation that he is not a party to. Another defense is limitation of liability, and that if the beans were lost at all, they were lost without the fault or privity of the owner of the vessel at that time. [40]

Q. What is your occupation?

A. I am in the shipping business.

(Testimony of B. H. Tietjan.)

Q. How long have you been in the shipping business?

A. Well, I have been on the front here for 49 years.

Q. What is your present business?

A. I am handling vessels.

Q. Do you own any scows?

A. Yes; I have got four myself.

Q. Have you been in the scow business, carrying cargoes around San Francisco here, and on the Sacramento River?

A. Yes, sir.

Q. For how many years? A. Since 1867.

Q. Were you ever master on any of those scows?

A. Yes, sir.

Q. Deck-hand on any of them? A. Yes, sir.

Q. For how many years?

A. Well, I was master in 1868 and 1869, and then from 1872 up to the time I quit.

Q. Do you know the "Francis E. M. Bernard," or did you know her?

A. Yes, sir.

Q. How long did you know her?

A. I must have had her about 8 years or so.

Q. Had her, what do you mean by having her?

A. I was agent for Fernandez.

Q. You were agent for the vessel for 8 years; is that right?

A. Yes, sir.

Q. Do you remember the time that she left San Francisco to go to Rio Vista, some time about October, 1904?

A. Yes, sir.

Q. Who went out master on her? (Addressing Mr. Frank:) Have you any objection to my calling

(Testimony of B. H. Tietjan.)

his attention to the name?

Mr. FRANK.—No.

Mr. HUTTON.—Q. Paul Ewald? A. Yes, sir.

Q. Did he ever work for you?

A. Yes, sir, he worked for me for two years on the same vessel.

Q. Did he ever work after that?

A. Yes; he run the schooner "Rough-and-Ready" after that. [41]

Q. In what capacity? A. Captain.

Q. Was he a competent captain or was he not a competent captain?

A. Yes, sir, he was competent.

Q. A good man? A. Yes, sir, a good man.

Q. How did he compare with the average captain in that line of business?

A. He was a good average captain; he was not the best and he was not the poorest by a longshot.

Q. Who appointed him captain on that trip?

A. I did.

Q. What was the usual crew carried by the "Francis E. M. Bernard"? A. Two men.

Q. What do you mean by two men?

A. Captain and one man.

Q. How many years was she run that way?

A. As long as I had her.

Q. Was that enough for her? A. Yes, sir.

Q. A sufficient crew for that vessel?

A. Yes, sir.

Q. What condition was the vessel in at that time, the time she left to go to Rio Vista?

(Testimony of B. H. Tietjan.)

A. She was in good condition.

Q. What was the condition of her sails?

A. They were all right.

Q. Were they new or old?

A. I had a new mainsail and a new jib put in her.

Q. At that time? A. Yes, sir.

Q. How was her rigging?

A. Her rigging was good.

Q. And her hull?

A. Her hull was good; she had been on the ways in the spring; she had been on the ways every year. I always kept the vessel up.

Q. How long had she been on the ways prior to this trip?

A. I could not tell that; I don't remember everything just now, but she was on the ways every year.

Q. Can you remember about how long it was before this?

A. No, I could not, excepting that I had my books.
[42]

Q. What ways was she on?

A. On Anderson's ways. He has the books.

Q. Was there much work done on her then?

A. Yes, sir.

Q. Who superintended it? A. Mr. Anderson.

Q. Did you have anything to do with it?

A. I left it to him to do the work. I was out and looked at her two or three times, but Anderson superintended the work.

Q. When she left the ways on that occasion what was her condition?

(Testimony of B. H. Tietjan.)

A. She was in good condition.

Q. And you say she was in good condition when she started on that trip also?

A. Yes, sir, she went away with a load of lumber from Meiggs' Wharf.

Q. Did you collect any freight money for that trip—that is, for the beans? A. No, sir.

Q. You were never paid for the beans?

A. No, sir.

Q. What was the condition of her running-gear when she left San Francisco to go to Rio Vista?

A. The running-gear was good so far as I know. They could get whatever they wanted; whatever the captain ordered he always got it.

Q. Were you ever on board of her?

A. When she came from the ways I was on her, when they overhauled her.

Q. Take the "Francis E. M. Bernard" with a load of beans; say she had 900 sacks of beans on her—where would be a proper place to stow that vessel—those beans—if she was properly loaded?

A. Well, it is different on different kinds of vessels. She carries more on deck. She has a big beam and shallow. I had 50 tons of coal on her, 45 on deck, and she sailed up the river all right.

Q. Properly loaded that way? A. Yes, sir.

Q. Suppose she had 125 sacks of beans in the aft-hold and the [43] rest on deck, would she be properly loaded?

A. She would be properly loaded, enough to beat down on; she would be stiff enough to sail on.

(Testimony of B. H. Tietjan.)

Q. How do these scows and vessels engaged in the river trade usually carry their loads, where do they usually carry them, on what part of the ship?

A. Some in the hold and some on deck.

Q. Where is most of the load carried?

A. Most on deck, with scows.

Q. Then, for all practical purposes—that is, for the purposes of carrying that load, the load of beans from Rio Vista, or close to Rio Vista, to San Francisco, I will ask you whether the “Francis E. M. Bernard” would be properly loaded with 125 sacks of beans in the aft-hold and 775 sacks on the deck?

A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. These vessels that you have been speaking of as carrying deckloads are known as scow-schooners, are they not? A. Yes, sir.

Q. That is, they are square fore and aft, flat-bottom and straight sides? A. Yes, sir.

Q. The “Bernard” was not built that way, was she?

A. She was built flat on the bottom and a big beam.

Q. She was not built that way, was she?

A. No, she had a sharp bow.

Q. And she had a bilge-side?

A. She had a scag.

Q. And she carried a center-board, did she not?

A. Yes, sir.

Q. That is different from most of these vessels, is it not? A. It is a little different.

(Testimony of B. H. Tietjan.)

Q. It would make a difference in her stability too, would it not?

A. No, not in her, because she has so much beam and was shallow; if a vessel is deep—

Q. (Intg.) How deep was she?

A. I don't think she was more [44] than 3½ hold.

Q. Are you sure of that?

A. I am almost sure it was 3½.

Q. What are you basing that testimony on?

A. Well, I have been down in her many times.

Q. How long was she?

A. I could not tell you that.

Q. How wide was she?

A. She must have been 18 feet beam, I think.

Q. Well, do you know?

A. I am only making a guess at it; I don't know; she had a big beam and was shallow.

Q. Do you consider 18 feet a big beam for a 54-foot vessel?

A. Yes, according to the draught of the vessel; I have a vessel which takes everything on deck and nothing in the hold, and I have a vessel which takes half on deck and half in the hold.

Q. Vessels differ in that respect, do they?

A. Yes, sir.

Q. They are differently built?

A. Yes, sir, they are different in the beam and the depth.

Q. They differ with reference to their carrying capacity and the manner of loading, do they not? Each

(Testimony of B. H. Tietjan.)

vessel has its own peculiarities.

A. Well, according to the depth of a vessel and the beam, of course.

Q. That is the only thing you base your distinction upon? A. Yes, for stiffness.

Q. I say, the depth and the beam are the only things upon which you base your distinction upon between the manner of loading different vessels?

A. Yes, sir.

Q. You say she carried a cargo of coal for you once, with 45 tons on deck and 5 in the hold?

A. Yes, sir.

Q. When was that?

A. That was a long time ago.

Q. How long ago?

A. That must be 18 or 20 years ago.

Q. How do you happen to remember that detail now after 18 or 20 years?

A. Because I know I was down there when she took [45] it in and the captain said that he put 5 tons in the hold, and I said, "Is she stiff enough with that?" and he said, "Yes, she is stiff enough for sailing"; he said, "She is all right." I never sailed her myself.

Q. You never sailed her yourself? A. No.

Q. And you had nothing to do with the loading of her at this time? A. No, sir.

Q. All you know about it is that the captain told you she had 5 tons in the hold? A. Yes, sir.

Q. That is all you know about the transaction?

A. I was there when she took in 5 tons. I asked

(Testimony of B. H. Tietjan.)

him if that was all she required and he said yes.

Q. And you did not weigh any of the coal and you were not there to see any weight of it in the hold or on the deck?

A. I had the weight in the book; the bill came to me.

Q. The bill for the whole amount of coal?

A. Yes.

Mr. FRANK.—I am not taking the trouble to object to the testimony as it comes along, your Honor, or to move to strike it out. That has not been our practice. However, I desire to call your Honor's attention to this, that the objection to this testimony is that it is hearsay testimony.

Mr. HUTTON—I think that he said that he saw the coal in the hold and he asked the captain how much there was; the captain told him there was 5 tons. That is my recollection of it.

The COURT.—That is what he said.

Mr. FRANK.—That is right, and I think that is hearsay testimony as to the amount of coal that was in there.

Q. Upon this occasion where did she go with this coal?

A. She went somewhere up on the Stockton River. I do not remember exactly the place. [46]

Q. Of course, you did not go with her?

A. No, sir.

Q. And you don't know anything about the nature of the winds and the weather on that trip?

A. No, sir; I don't remember anything about that.

(Testimony of B. H. Tietjan.)

Q. And you do not know anything about how she acted or behaved? A. No.

Q. All you know is that she did not capsize?

A. She did not capsize. She came back all right.

Q. Did I understand you to say you never sailed her yourself? A. No, sir.

Q. And all you know about her is you have seen her lying alongside the dock here in San Francisco and you sent her off?

A. Well, I have been on her every time she has been on the ways.

Q. I mean so far as her navigation is concerned, you had nothing to do with her and never saw her and know nothing at all about her except you saw her lying alongside the dock in San Francisco?

A. No, sir, I had never been with her.

Q. Have you any other vessels in your employ that are sharp vessels, rounded with bilge, and center-board? A. No, sir.

Q. You never saw any other like that, did you?

A. Oh, yes, I have seen a good many of them.

Q. You never handled any?

A. No, not that I remember.

Q. With reference to this man who went as captain this time, was this the first time that you met him when he went as captain?

A. No, he was on the vessel.

Q. This was the first time he ever went as captain, was it not?

A. Yes; she was lying down at Meiggs' Wharf, and it was blowing, and the captain didn't show up,

(Testimony of B. H. Tietjan.)

and I told him to get a man and make the trip and I would make him captain when he came back. It was late in the evening, and it was blowing down there, [47] and I wanted him to get away from the wharf.

Q. I am not sure that I understood you. Who did you tell to get a man and you would make him captain?

A. I told the man who went captain on that trip; I told him to get a man and make trip and I would make him captain when he came back. It was late in the evening and it was blowing, and I said it would be all right when he came back.

Q. You had never known this man to act as captain of any vessel before?

A. Well, he was two years in the "Bernard."

Q. But he was there as a deck-hand, was he not?

A. Yes.

Q. And that is all?

A. I don't know that he was ever captain.

Q. You never made any inquiry about him at all? All you know is, you simply picked him up and told him to take her up there and that when he came back you would make him captain?

A. No, sir, he was on the vessel; if I didn't know he was competent I would not make him captain.

Q. How do you know he was competent?

A. The captain who was on the boat said he was a good man.

Q. That is, he was a good man in the position he was occupying on board of her?

A. He said he was a good man.

(Testimony of B. H. Tietjan.)

Q. That is all he said to you? A. That is all.

Q. How long was it before this occasion, when the captain told you he was a good man?

A. Oh, it might have been a year or six months.

Q. He was not recommending him then to be captain of the vessel?

A. No, I had no show to put him captain.

Q. He was the deck-hand on the vessel, and the captain in conversation with you said he was a good man; that is the substance of it? A. Yes.

Q. That is all there was to it? A. Yes.

Q. How many years ago was that—how many years ago was it that [48] you had that conversation?

A. I could not give you that out of my head.

Q. Was it 8 or 10 years ago?

A. I could not say. It was quite a while before the fire—I know that.

The COURT.—I thought he said it was a year or so before this trip?

Mr. FRANK.—A year or so before this trip.

Q. Why did not the old master take her on this occasion? A. Because he did not show up.

Mr. HUTTON.—I don't think that is material. The witness has already stated that it was blowing, and that the captain did not show up and so he told this man to get a man and go captain, and he would make him captain when he came back.

Mr. FRANK.—I did not catch that.

Q. The old master did not show up—is that the fact? A. Yes, sir.

(Testimony of B. H. Tietjan.)

Q. Then, as I understand you now, you had a master on board this vessel and you had this man as deck-hand? A. Yes, sir.

Q. And that it was blowing and that you wanted to get the vessel away and that the master did not show up? A. Yes.

Q. And so you told the deck-hand to get another man and to take the vessel out and when he came back you would make him master?

A. Yes. It was late in the evening. He was up in Rio Vista the next morning.

Redirect Examination.

Mr. HUTTON.—Q. What do you mean by making him master when he came back?

A. I would take him up to the Custom-house.

Q. Did you appoint him master for that trip?

A. Yes, sir, I appointed him master.

Q. You meant, then, that when he came back you would enter him in the Custom-house as master?

A. Yes, sir. [49]

Q. That is what you mean by saying you would make him master when he came back?

A. Yes, sir.

Q. Don't all scows have center-boards?

A. Yes, sir.

Q. Flat-bottom ones and square-bow ones, do they carry center-boards, as a usual thing?

A. Yes, and all sharp schooners on the bay, too, have center-boards, so far as I know; I don't know any tail ones except yachts.

Q. Do you know any that have not center-boards?

(Testimony of B. H. Tietjan.)

A. No, sir.

Q. How many have you come in contact with since you went into the business of operating and sailing scows?

A. I could not tell you that, but a good many.

Q. 100 or 500?

A. I have seen over 100 of them.

Q. Now, I will ask you this: during the eight years that you were the agent for the "Francis E. M. Bernard," was she operating all the time?

A. Yes, sir.

Q. Did you ever see her with loads on board of her?

A. Yes, sir.

Q. Often?

A. Yes, often. One time she went to Oakland with hay, and then I didn't see her so often.

Q. How many trips a month did she make?

A. She made six trips a month sometimes.

Q. Did you use to see her every time she came in?

A. No, not every time when she went to Oakland.

Q. About how many times a year would you see her with a load on board during the time you were agent of her? A. I would see her every month.

Q. And with respect to the way she carried the load that you saw on her, were they on deck or down below?

A. On deck. The hay—of course she had a load full of hay and would carry as much as she could. With barley, we would not fill the hold because it was hard to get at.

(Testimony of B. H. Tietjan.)

Q. Did you ever sail on a round-bottom schooner?
[50]

A. I was on one in 1867, the "Kid Blackstone."

Q. Did you sail on her yourself? A. Yes, sir.

Q. Was she anything like the "Bernard"?

A. Something like her, so far as I can remember;
it is a long time ago. We went with cement in her.

Q. How long after this trip was it that Ewald
went to work for you as master?

A. He had the "Winfield Scott" and the "Rough
and Ready" both; he had the two of them. He had
the "Winfield Scott" and he had the "Rough and
Ready."

Q. Captain on both of them?

A. Yes. He was on the Oakland long wharf when
that fire was over there, when the Frenchman was
burned. He was captain of her before that time.
He had the "Scott" before that.

Q. You had him captain with you for a couple of
years after the "Francis Bernard" matter, did you?

A. Yes; it must be something like that. He was
captain of a hay-scow after that.

[Testimony of P. H. Sommer, for Respondent.]

P. H. SOMMER, called for the respondent, sworn.

Mr. HUTTON.—Q. What is your business?

A. I am a master mariner, captain of a scow.

Q. And what has been your business?

A. That has been my business all the time.

Q. Have you been a ship-builder, a ship-carpenter?

A. No, sir, never.

Q. How long have you been captain of a scow?

(Testimony of P. H. Sommer.)

A. Since 1886.

Q. Were you deck-hand on scows before that?

A. Yes, from 1881.

Q. Do you own the scow that you are master of?

A. Yes.

Q. Own her yourself? A. Yes.

Q. Have you owned other vessels besides?

A. No. [51]

Q. How long have you owned her? A. 22 years.

Q. Do you remember being up in Cash Creek one time, when the "Francis Bernard" was at the bottom of the creek, or at the bottom of the river?

A. Yes, sir.

Q. Did you help to raise her? A. Yes, sir.

Q. You finally got her up? A. Yes.

Q. Do you know anything about the values of scows around the bay of San Francisco, what they are bought for and what they sell for?

A. Well, there is quite a difference between then and now.

Q. Well, at that time were you familiar with the price of vessels and what they were worth?

A. Well, yes, a little bit.

Q. With respect to the "Francis E. M. Bernard," you finally raised her, did you not? A. Yes, sir.

Q. When you got her up did you examine her at all?

A. I did not examine her but just what I seen of her.

Q. You saw a hole in her, did you not?

A. Yes, sir.

(Testimony of P. H. Sommer.)

Q. What was the condition of her planking there, was it sound or unsound? A. It was sound.

Q. What was the condition of her rigging and the hull generally, outside of the hole that was in her, was it good or bad?

A. It was in pretty good condition, so far as I can remember.

Q. In good condition? A. In good condition.

Q. What would you say was the value of the "Bernard" as she lay at the bottom of the river, before you did anything to her at all?

A. Well, I don't know, but I would not give much over \$300 for her.

Q. You think that would be a fair and reasonable value for her as she lay at the bottom of the river?

A. Yes, at the time she was at the bottom of the river. [52]

Q. That is, at the time of the accident?

A. Yes, sir.

Q. Do you know where she was finally taken to?

A. We had her alongside and we towed her up to Wood Island and she lay there.

Q. What was she, Captain, a good schooner or a bad schooner, generally considered, according to your knowledge of these things?

A. She was in pretty good condition as near as I can remember, the hull.

Q. Do you know how many days you got there after she sunk?

A. I got there the same night when she sunk.

Q. What do you carry on your vessel?

(Testimony of P. H. Sommer.)

A. I carry anything that comes along, hay, grain, beans, lumber, coal—anything.

Cross-examination.

Mr. FRANK.—Q. Captain, what do you think was a fair value of the “Bernard” at that time, before she sunk? A. Before she sunk?

A. Yes.

A. Well, I would consider about \$1,000—\$900 or \$1,000,—somewhere around that.

Q. That is all she would be worth?

A. That would be the value of her, yes; she may be worth more to some who would work for her, but I would say that at that time the value was about \$1,000, before she sunk.

Q. Do you know what it cost to raise her?

A. Well, I got \$50 for doing my share and the company got \$250. They towed her down here to the “Bernard’s” landing.

Q. They got \$250 for towing her down?

A. That is what I heard.

Q. You raised her and got \$50? A. Yes, sir.

Q. And after you raised her she was towed from there down to Pinole Point?

A. Down to Fernandez. [53]

Q. And for towing her down they got \$250?

A. That is what I heard.

Q. At any rate, the raising cost \$50?

A. Yes, sir.

Q. The hole that she had in her was nothing but a little hole that a man could probably just about get his hand in?

(Testimony of P. H. Sommer.)

A. That is all. It was on the port side by the fore-rigging.

Mr. HUTTON.—Q. How big was it?

A. There was just one plank bruised in a little.

Mr. FRANK.—Q. It would cost about \$50 to repair it?

Mr. HUTTON.—He could not tell that. He has not shown himself to be an expert.

Mr. FRANK.—Q. You have not got any idea?

A. Well, repair that for \$50—it would not cost that much to repair that hole.

Q. You have your own vessel and you know what it costs to repair things? A. Yes, sir.

Q. And that would not cost \$50?

A. It would not cost more than \$50.

Q. Why, then, do you value her at only \$300 when she was at the bottom?

A. Well, that was a kind of a hard proposition. I don't think I would give even that much. It is pretty hard to value a vessel at the bottom.

Q. She is worth at the bottom all she is worth at the surface less what it would cost to bring her up and repair her—is not that right?

A. Well, you may look at it that way. It is a hard proposition to value a vessel underneath the water.

Redirect Examination.

Mr. HUTTON.—Q. Captain, when a vessel sinks there is other work to do besides patching up a hole, is there not? A. Yes, a whole lot of things.

Q. How about her sails and her rigging and all those things, [54] they get out of order and need

(Testimony of P. H. Sommer.)

work, don't they, when a vessel sinks?

A. Yes, sir.

Recross-examination.

Mr. FRANK.—Q. She was only down three days; you got her up three days after she sunk, did you not?

A. I got her up on the second day, and I got her down to Wood Island and then I got relief.

Q. And after that they had to wash off the sails, did they not?

A. Well, everything was gone, the covers and everything else; she was bottom up.

Mr. HUTTON.—Q. You say she was bottom up?

A. Yes, she was bottom up. The masts were in the way; she was not just exactly right straight bottom up.

Q. Of course, that would affect her sails and rigging and all her cooking utensils?

A. Yes, and her lights; everything floated away.

Q. Then she was without hatches and without cooking utensils and the general paraphernalia on a vessel; is that right? A. That is right.

[Testimony of Thomas D. Fernandez, for Respondent.]

THOMAS D. FERNANDEZ, called for the respondent.

Mr. HUTTON.—Q. Has the "Francis E. M. Bernard" ever operated since the time of this accident?

A. No, sir, not to my knowledge.

Q. Do you remember the time of it?

A. I think it was in the fall of 1905.

Q. Did you see her after the accident?

(Testimony of Thomas D. Fernandez.)

A. I saw her when she was brought in to where she now lies.

Q. And she has been lying over at Pinole Point ever since? A. Yes, sir. [55]

Q. She is still there? A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. Why didn't you repair it?

Mr. HUTTON.—It was not his vessel.

Q. It was your father's vessel, was it?

A. Yes, sir.

Mr. FRANK.—Q. Why wasn't she repaired?

A. I don't know.

Q. She had no injury to her except this small hole, one plank broken in her bow, did she?

A. I did not go around her at all; I just saw her from the wharf.

Mr. HUTTON.—Your Honor, I have the testimony of the Master, Ewald; will I read it or file it?

The COURT.—I think you had better file it unless you want to call attention to some special portion of it.

Mr. HUTTON.—No, there is nothing I desire to call your Honor's attention to; it sets forth the character of the accident, how it happened, and the condition of the vessel.

The COURT.—Both counsel, no doubt, are familiar with the deposition.

Mr. FRANK.—I am familiar with it.

The COURT.—The Court will have to read it anyhow.

Mr. FRANK.—It is a short deposition and prob-

ably will aid your Honor somewhat in understanding the points that will be made in the argument if your Honor knows what is in the deposition.

The COURT.—Very well; you may read it.

Mr. HUTTON.—It is not exactly a deposition, if your Honor please. The case was on the calendar here for quite a number of days, a month, in fact, and the witnesses kept coming here and finally his Honor—I think it was Judge Bean—

Mr. FRANK.—Well, it does not make any difference about [56] that; it may be taken in the form of a deposition, or whatever it is; it is of the same value.

Mr. HUTTON.—Yes, of the same value. It reads as follows (reading).

**[Testimony of B. H. Tietjan, for Respondent
(Recalled).]**

B. H. TIETJAN, recalled for respondent:

Mr. HUTTON.—Q. How large around is a sack of beans, the diameter?

A. Well, I could not tell you exactly; it is not very big.

Q. How big?

A. Well, I would not make any estimate.

Q. You stated about the depth of the hold of the “Francis Bernard”; when the beans were three sacks high, how near would that come to filling up between the floor and the deck-beam?

A. Well, I don’t know exactly the size of a sack of beans.

Q. They are all about the same size?

A. I have not handled any myself.

(Deposition of B. H. Tietjan.)

Q. You never saw a sack of beans?

A. I have seen them but I don't remember—I would not know anything about the size of the sack.

Q. With respect to a scow or these river vessels, or any sailing vessel, when they get in the river where they are liable to get a puff of wind from among the trees, or around there, what effect does it have on them?

A. You have to manage them quick; sometimes you cannot do it, there is not room enough.

Q. Is not that the case with all sailing vessels, whether they are scow schooners or ocean vessels or anything else?

A. Yes, but especially on the Sacramento River because you have not much time there.

Q. Do you remember about where the main mast of the "Bernard" [57] set with reference to her length?

A. No, I could not tell exactly; it must be pretty near in the middle.

Q. And aft the main mast there is a hold and then comes the cabin; is that right? A. Yes, sir.

Q. Is there much of a hold forward of the main mast? A. Yes, quite a little hold.

Q. Now, I ask you with reference to 1,000 sacks of beans, Captain, 45 tons of beans; suppose 45 tons of beans weighed 85 lbs. to the sack, and there were 125 sacks down in the hold, from your experience with scows and your knowledge of the "Francis E. M. Bernard," would she be properly loaded that way?

A. Yes, she would be properly loaded to sail.

(Deposition of B. H. Tietjan.)

Cross-examination.

Mr. FRANK.—Q. Captain, of course a vessel answers her helm quickly or otherwise, according to the size of the rudder, does it not? You could hold those vessels up if you had a larger rudder on them, could you not?

A. Oh, that would depend upon the wind and upon the headway she got.

Q. If she has ordinary headway and is going along with the wind, there may be a wind over her, say three-quarters aft, and she had a good-sized rudder, you could hold her, could you not?

A. Yes, you could hold her with a rudder anyhow, if the rudder is large enough, if you have a good working boat.

Q. I don't want you to misunderstand what I am after; I am asking you this, and I understood you answered in the affirmative, but we will repeat it. If the rudder under those conditions is large enough you can hold her? A. If she don't jibe over.

Q. The sails did not jibe; we will leave that out.
[58]

A. If she has got headway she will steer.

Q. You ought to be able to hold her?

A. Yes, if she has got headway she will steer.

Mr. HUTTON.—Q. Supposing the wind changes quickly; Captain, can you always hold her then?

A. No; that is just where it comes in; when the wind is quick sometimes she comes back and jibes over quick.

Q. Did you ever see the rudder on the "Bernard"?

(Deposition of B. H. Tietjan.)

A. Yes.

Q. Was it large enough for her? A. Yes, sir.

Q. Was it a small rudder or a large rudder or an average rudder?

A. It was a good large rudder for her.

Q. I understand you to say that when the wind changes quick they jibe and when *the* jibe you cannot hold her?

A. It all depends upon the circumstances.

Q. I understand that. Where the sails do not jibe and the wind is well aft, she ought not to come up into the wind, ought she?

A. If she had headway enough to hold the helm, she has to mind the helm, but if she has not got much headway and a puff comes, then that is the time.

Q. But not when the wind is three-quarters aft?

A. It depends on the headway she has. If she has headway enough to feel it on the rudder she ought to mind the rudder.

Q. When she comes up to the wind is when she has the wind over her side, is it not?

A. On the quarter. If you get a puff of wind she will burst, too, if you don't beat her quick. Sometimes you have to let the main mast go.

Q. And sometimes you have to let the sheet go?

A. Yes.

Mr. HUTTON.—That is our case, your Honor.

[Testimony of John Erickson, for Libelants.]

JOHN ERICKSON, called for libelants, sworn.

Mr. FRANK.—Q. Captain, you are a seafaring man—you have been? A. Have been, yes, sir.

Q. What is your present occupation?

A. River freighting.

Q. Handling it by schooners? A. Yes, sir.

Q. How long have you been in that business?

A. About 21 years.

Q. Either during that time or previous to that time you yourself navigated these vessels on the river and on the bay?

A. No, I have not; my experience has been outside altogether.

Q. Going to sea in deep-sea vessels?

A. Yes, sir.

Q. In your business, during the last 21 years, in handling these schooners, have you attended to the loading of them yourself?

A. Well, of course, the captain attended to the loading of them; I do not.

Q. What part did you play in them so as to know that your vessels were properly laden?

A. I got the freight for them and then hired the captain to attend to the loading of them, and so on; of course, they have got experience and they know exactly what the vessel requires. Some vessels trim differently from others, but they have to get a little experience in the vessel to know that.

Q. That is, one vessel will trim differently from another vessel? A. Yes, sir.

(Testimony of John Erickson.)

Q. And you have to know the vessel in order to know how to trim her? A. Yes, sir.

Q. By knowing the vessel, I suppose you mean you have to have loaded her on previous occasions and see how they will sail? A. Yes, sir.

Q. Did you know the "Francis E. M. Bernard"?

A. Oh, yes, I have seen her, but I never was aboard of her. [60] I have seen her going by the dock, and so on, when she was running. It is a long time ago since she was put *on* of commission.

Q. You know what kind of a vessel she is?

A. Yes; a round-bottom schooner.

Q. Speaking generally, and from your information and knowledge in handling these vessels, would a round-bottom vessel of that sort be more tender than a flat-bottom vessel?

A. Well, it depends a good deal on how much beam they have. If they have plenty of beam they are pretty stiff but otherwise they would be cranky.

Q. You know the "Bernard," you know her beam?

A. I guess she was the same as the ordinary boats on the ways.

Q. From your knowledge of "Bernard" what would you say with reference to loading her with 5 tons under deck and 40 tons on deck, as to whether or not that is a proper means of loading the vessel?

A. 5½ in the hold?

A. 5 tons or 5½ in the hold and 40 tons on deck?

A. Well, it don't look to be hardly enough in the hold.

Q. You think that under those circumstances she

(Testimony of John Erickson.)

would be improperly loaded?

A. I would rule that she ought to have about one-third of it in the hold, or something like that. Of course some vessels are different from others.

Q. Well, you know this vessel, and we are speaking of this particular vessel now.

A. I have never been aboard her or sailed her or handled her and I could not tell, but according to my judgment I would think there was hardly enough in the hold.

Cross-examination.

Mr. HUTTON.—Q. Captain, do you know how long the “Bernard” was?

A. No, I have not looked up the length of her.

Q. Do you know how wide she was?

A. No, I do not know exactly. [61]

Q. Do you know how deep she was?

A. No, I have not looked up her dimensions at all.

Q. You never went aboard of her in your life, did you? A. No, I was not aboard of her.

Q. Most of these scows are built so as to carry the cargo on the deck, are they not?

A. Well, they carry a certain portion on deck; they carry about two-thirds on deck and about one-third in the hold. That is about the rule with them.

Q. That is, with some scows?

A. Most all of them.

Q. Some of them carry everything on the deck?

A. Some of them are built so they carry nothing in the hold. For instance, they are so shallow that they

(Testimony of John Erickson.)

put hardly anything in the hold, they carry it mostly on deck.

Q. A shallow vessel as a rule carries it almost all on the deck?

A. Yes, and because they are so built you cannot carry anything in the hold, because it is hard to get at it.

Q. What scows are you managing now?

A. I manage thirteen now.

Q. Give us the name of one of them.

A. The "Matilda" is the biggest one; another is the "Eppinger"; another is the "Port Costa"; another is the "Crockett."

Q. The "Matilda" has a deep hold? A. Yes.

Q. How deep is her hold? A. About 61½ feet.

Q. She would carry about one-third down below and two-thirds on deck?

A. No, she would carry more than that in the hold.

Q. How much would she carry?

A. About half and half.

Q. And the "Eppinger," how deep is she?

A. About the same.

Q. She would carry half and half? A. Yes, sir.

Q. Now, take one of the small ones; give us the name of a small one.

A. The "Ruby," a round boat, she [62] is built about the same as the "Bernard."

Q. Well, you don't know the "Bernard," you never were aboard of her?

A. Well, I looked at her.

Q. You saw her at a distance?

(Testimony of John Erickson.)

A. Going by alongside the wharf. I never was aboard of her to my knowledge.

Q. You have seen her lying alongside of the wharf, the same as any other vessel?

A. Well, she was built a good deal like the "Ruby."

Q. They all have center-boards, have they not?

A. Yes, sir. You cannot handle them without a center-board.

Q. You have carried beans, have you?

A. Oh, yes; we have carried lots of beans.

Q. How large is a sack of beans?

A. Not very large. They are a good deal smaller than a sack of barley.

Q. How large in diameter?

A. Oh, I don't know.

Q. A foot and a half?

A. About 2 cubic feet, or something like that.

Q. 2½ feet? A. Yes.

Q. In diameter, or in length, do you mean?

A. By measurement.

Q. I mean in diameter; take a sack of beans; how large is it in diameter? Is it as big as that globe up there? A. It is a little bigger than that.

Q. That is about 15 inches; will you say a sack of beans is 18 inches in diameter?

A. Well, about 15 or 16 inches.

Q. If you piled three tiers of beans, three sacks of beans on top of one another in the hold 3 feet deep you would have the hold pretty nearly filled up, would you not?

A. I think she would take 5—no, she would not either.

(Testimony of John Erickson.)

Q. If you take 3 sacks of beans in a hold 3 feet deep, you have the hold filled up?

A. Between 3 and 4 would fill her up.

Q. You could not get the fourth in, could you?
[63]

A. You could forward but not aft. The vessel is a little higher forward.

Q. You have the hold practically full, then have you not? A. Yes, sir.

Redirect Examination.

Mr. FRANK.—Q. What is the depth of the hold in the “Ruby”?

A. She is a deeper vessel, she is about 5 feet deep, or 5½ feet. She was built on to, raised 10 inches; she was shallow before but we raised her 10 inches.

Q. Assuming that the “Bernard” had a 4-foot hold, 18-foot beam, and 45 to 50 feet in length, would your idea of the manner of loading, if applied to a vessel of that size, that she should have one-third underneath, would that be your idea?

A. If they have not got a full load they would be stiff. They would be cranky when you got a full load on, but if they have less than a full load they will be stiff. If you load them deep and there is not sufficient in the hold it will make them cranky.

Q. What do you mean by a full load?

A. To load her down to the loading capacity.

Q. If her hold is not full, although she may be in one place loaded up to the deck, she is loaded fore and aft full, and then with 40 tons on deck, do you think a vessel of that size would be cranky?

(Testimony of John Erickson.)

Mr. HUTTON.—I think that is leading, your Honor.

Mr. FRANK.—Yes, I think it is myself.

Mr. HUTTON.—He says he never was aboard the “Bernard”; he never sailed her; I don’t think his testimony is of much value.

The COURT.—The question is leading.

Mr. FRANK.—Q. Would your testimony regarding your idea [64] of the proper or improper method of loading the “Bernard” be changed if you were told that her hold was 4 feet deep, and her deck-beam 18 feet, and her length 45 to 50 feet, make any difference in your testimony?

A. How many tons did she have aboard her?

Q. The same has already been put to you; 45 tons.

A. The capacity of that vessel fully loaded, how much did she carry?

Q. I could not tell you because she was not loaded.

A. Well, of course that would make a difference. I think, though, that in my judgment she ought to have a little more in the hold, but she may be stiff without it; I don’t know the vessel exactly enough for that.

Q. I thought you told me the other day, Captain, you knew the vessel?

A. I knew the vessel by sight, but I was never aboard of her.

Q. You have known her up and down the bay for years?

A. Oh, yes. She was principally in the hay busi-

(Testimony of John Erickson.)

ness. She was running hay for Bernard most of the time.

Mr. HUTTON.—Q. Now, Captain, is not this a fact, that as a rule captains may disagree on the way to load a vessel, one man may think it is all right loaded a certain way, and another fellow may think it ought to be a little different; it is largely a matter of opinion, is it not—that is right, is it not?

A. Yes, sir.

Q. A man who has been on a vessel for two years, you would naturally think he knew more about it than you would; that is right, is it not?

A. Of course, the longer a man is on the vessel the more he would know about her.

Mr. FRANK.—Q. If a man had nothing to do with loading the vessel before, but was only deck-hand, cook, and bottle-washer, [65] you would not place very much reliance on his judgment, would you, after two years of that experience?

Mr. HUTTON.—The man has to start as captain some time. According to your theory, unless a man has been captain for five years, he is incompetent prior to that time.

A. If a man is a long time in a vessel he ought to know from his experience just what she is able to carry.

Mr. FRANK.—Mr. Reporter, will you please read the question to the witness?

(Question read by the Reporter.)

A. No, because some men don't take much notice.

Q. They have no responsibility with respect to the

(Testimony of John Erickson.)

loading and therefore they have no knowledge concerning it; is not that the basis of it?

Mr. HUTTON.—That is leading and immaterial.

Mr. FRANK.—I withdraw that. I will address that argument to your Honor when we come to argue the case. That is all.

(Thereupon the cause was argued and submitted.)

[Endorsed]: Filed Feb. 26, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [66]

[Title of Court and Cause.]

Honorable MAURICE T. DOOLING, Judge.

Saturday, November 1st, 1913.

REPORTER'S TRANSCRIPT.

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Direct Cross Re-D. Re-X

C. H. TIETJEN (recalled). 35 36 37 38
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Saturday, November 1, 1913.

[Testimony of C. H. Tietjen, for Defendant
(Recalled).]

C. H. TIETJEN recalled for defendant:

Mr. HUTTON.—Q. Have you had any experience in vessels such as the "Francis E. M. Bernard" and vessels engaged in that trade having holes punctured in their side below the water-line? A. Yes, sir.

Q. Has your experience been to any extent?

A. Well, I have had five myself that have been sunk, capsized.

Q. What effect has the puncture of a hole in the

(Testimony of C. H. Tietjen.)

side of a vessel, such as the "Francis E. M. Bernard," some 5 or 6 inches below the water-line, a hole the size of an ordinary person's hand?

A. They usually get full of water on that side and capsize on that side; they always capsize on the side the hole is and where the water runs in.

Q. Does it make any difference whether the vessel is loaded with cargo or whether she is not loaded with cargo?

A. No. The water gets on one side and they will capsize. If they are square vessels the air will keep them up, so long as they are kept tight—when the air goes out they sink.

Q. Do you know of many instances of vessels, other than your own, that have acted in this way, in particular trade, vessels that have run on snags in the Sacramento River or in any other river?

A. I had one of them with a load of hay in and she ran into a snag but she did not capsize; we ran her over on the flat; she was battened down so that she could not capsize and we had another schooner there that pulled her on to the flat before she capsized. But the hold got full of water and spoiled the hay. [68]

Q. In cases where something had happened your own vessels, with respect to getting a hole below the water-line.

A. I had five of them capsize, one over at Alcatraz, one at Mission Street, one at Beale Street, one at the Union Street and another one at Howard,

(Testimony of C. H. Tietjen.)

capsized on the beam end. Three of them were in a blow.

Q. I mean when they get holes in their sides; that is what I have reference to.

A. Two of them, a steamer ran into them and they filled with water and capsized; they laid on the beam, the air kept them up.

Q. Then, according to your experience, is the natural effect of a hole below the water-line such as to cause a vessel to capsize?

A. Yes, if the water runs to that side it capsizes easily.

Cross-examination.

Mr. FRANK.—Q. I understand you are testifying now from your experience with reference to five of your vessels; is that right?

A. Yes, my vessels, and what I have seen on the front I have not mentioned. I have not mentioned what I have seen on the front.

Q. Of these vessels I understand that three of them did not have holes in them, but they were capsized by the wind, by the blow?

A. Yes. They got water in them and capsized.

Q. That is, you mean that the storm turned them over?

A. Yes; well, they got water in them; they filled with water and capsized on the beam. They never capsized from the storm; we were tied up alongside of the wharf.

Q. Well, how did they fill with water? Did they fill over the top?

(Testimony of C. H. Tietjen.)

A. Yes. One of them got a pile through the bottom at Union Street. [69]

Q. Let us speak of the three you have mentioned. They got water in the top and they were sunken clear down to the water level so that the water run flush with the deck, did it?

A. She was loaded flush with the deck, loaded with coal.

Q. And then they filled with water and capsized?

A. When you get water in them they capsize on the beam.

Q. Now, of the other two, you say one was on Union Street?

A. Yes; she hung on a pile there and it put a hole in her and capsized.

Q. How big a hole?

A. It was not big; it was about 2 inches on one side, 2 inches between the two timbers.

Q. That hole was in her bottom, was it?

A. Yes, sir.

Q. Right up from below? A. Yes, sir.

Q. How long after she struck the snag was it before she capsized?

A. I was not on board of her at the time; there were two men on board of her at the time.

Q. You don't know anything about it except what was told you, do you?

A. I know when I hauled her on to the ways, to straighten her up.

Q. And is that the same about the other three, you were not present, and it is only what somebody told

(Testimony of C. H. Tietjen.)

you about it? A. I seen them myself.

Q. You saw them go over?

A. Yes. The one I had in Stockton, a steamer ran into her stern; she went down stern first, the stern took the botton before the bow went down; she went down straight; she had 12 feet of water.

Q. She had a large hole in her stern?

A. Well, not a large hole; she opened right where the planking gets to the stern, she opened that much (indicating), the size of my hand; she went down in 3 minutes. [70]

Q. She was full of water before she capsized?

A. She did not capsize at all; she went down straight; she went down stem first.

Q. Did you have any others that capsized?

A. Yes.

Q. What was the other one? A. The "Edna".

Q. You have mentioned five here, "Alcatraz," "Beale," "Mission," "Union" and "Howard," three of which were blown over and one hung on a pile; what was the other?

A. The other was tied up alongside the wharf; nobody was on board of her. She got water in her. There was a crack in her, the water came in and she capsized.

Q. All of these were full before they capsized, were they?

A. Well, not full exactly, but they capsized.

Q. Can you tell us about how much water they had?

(Testimony of C. H. Tietjen.)

A. I don't know just how much water she had in her.

Q. These vessels were practically full of water before they capsized though, were they not?

A. Yes, certainly they were; they were full enough to sink; there need not be much to sink them.

Q. Your idea is that when they get a hole in them and get water in them they will capsize toward the side where the hole is, if the water capsizes them?

A. Yes, sir. I never saw a vessel capsize without she gets water in her. I am always *ascared* of any vessel leaking and getting water in her. You have to keep the water out.

Q. But when the water will cause her to capsize, she will capsize towards the side where the hole is in her?

A. Yes, sir, that is my experience.

Redirect Examination.

Mr. HUTTON.—Q. Suppose the wind is on the other side, on the [71] side of the vessel where the hole is, and she has a list the other way, what effect will that have?

A. The water will run over to that side.

Q. Which side will she capsize on then?

A. She will capsize where the water is.

Q. That is, if she is listed and the water is away from the hole, that is the side she is most likely to capsize on?

A. She will capsize on the side where the water is.

Recross-examination.

Mr. FRANK.—Q. If a vessel is going as this ves-

(Testimony of C. H. Tietjen.)

sel was going and strikes on the bank, for instance, so that the hole then is about 6 inches below her water-line, and then she sheers off and goes in the other direction, she will list, will she not, in the other direction? She will list toward the side where her sails are, would she not? A. Yes.

Q. And carry the hole out of the water, will it not?

A. Yes, it will carry the hole out of the water.

Q. So that in order for this vessel to capsize by reason of the water going in, that water would have had to have gone in her instantly, would it not?

A. Well, she would not capsize unless she had enough of it.

Q. It would have to go in instantly because the moment she struck she sheered and the sheer would throw her on the other side and throw the hole out of the water, would it not?

A. If it threw the hole out of the water she would not leak any more.

Mr. HUTTON.—Q. But you don't undertake to say that the hole was out of the water, do you?

A. No, of course not.

Q. In fact, Captain, the "Francis E. M. Bernard" would not capsize [72] loaded as she was without she got water in her, would she?

A. No, sir. She had good beams and she was stiff.

Mr. FRANK.—Q. You don't know how she was loaded, do you?

A. I know she was loaded. I know she was stiff. I can bring the man up here who built her; she was built in 1865.

(Testimony of C. H. Tietjen.)

Q. When I asked you about her coming out of the water I don't want you to understand that I am asking you for something other than the facts as they appear here. This is what I want to call your attention to; the captain testifies that she struck the bank and that immediately that she struck the bank she sheered off and *when* over on the other side and capsized; he says she capsized immediately and I think he limits the time to about 5 minutes. Now, the moment she sheered off she would come up on the side where she struck the bank, would she not?

A. She could sheer off and capsize at the same time.

Q. Yes, she could do that, but the moment she struck the bank and began to sheer off she would come up on that side of the water, would she not?

A. No. If the wind was anywhere fair she will glance off the bank and go into the middle of the river.

Q. She had the wind on the other side, on the off side?

A. No. He told me he had a norther, and if he had a norther that would be a fair wind. Of course I was not there but I am talking according to my experience. I was there enough to know that.

The COURT.—Q. Do you know of any of these scows, Captain, to lose their deck-load without capsizing?

A. I don't know one of them capsizing without getting water.

Q. That is not the question I asked you. Do you

(Testimony of C. H. Tietjen.)

know any of them ever to get such a list as to lose the deck-load without capsizing? [73]

A. No. They capsize on the beam. They put the mast in the water. A square scow will float like a buoy. A round bottom one generally turns bottom up because they have not the same show. The mast is so heavy it turns over that way and the air from the bottom turns them bottom up.

Q. Was this a round bottom boat?

A. She had round bilges; she is very shallow and very beamy.

Mr. HUTTON.—Q. When a vessel situated as the “Francis E. M. Bernard” strikes on the bank and sheers off, as soon as she sheers away from the bank she rights herself, does she not, if she has listed when she struck the bank?

A. She will sheer right out into the stream. If a square bottom one strikes the bank she is stuck right there because she stays on the bank, but a round bottom boat glances off and swings out. A square one will generally strike on the corner and will stay there. A round bottom one generally gives a glancing blow and gets out.

[Endorsed]: Filed Feb. 26, 1014. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [74]

[Title of Court and Cause.]

**Testimony Taken Before United States
Commissioner.**

WEDNESDAY, MARCH 26th, 1913.

APPEARANCES:

NATHAN H. FRANK, Esq., for the Libellant.

H. W. HUTTON, Esq., for the Respondent. [75]

[Testimony of Paul Ewald, for Respondent.]

PAUL EWALD, called for the respondent, sworn.

Mr. HUTTON.—Q. What is your name?

A. Paul Ewald.

Q. How old are you? A. 36.

Q. What is your occupation?

A. Sailor; seaman.

Q. Where are you working now?

A. Government.

Q. On what vessel? A. Steamer "L. Aguador."

Q. Where does she run?

A. Well, she only runs in the bay to different forts and posts.

Q. How long have you been on her?

A. Going on a year this coming May; the 27th of May last year I went there.

Q. How long have you been going to sea?

A. Since I was 15 years old.

Q. How long have you been going to sea around San Francisco?

A. Well, I have been sailing ever since I came out here, 1895; I have been sailing ever since.

Q. Captain, on any scows?

(Testimony of Paul Ewald.)

A. Yes, sir, on four of them.

Q. What ones? A. "Bernard."

Q. When you say the "Bernard," give the full name.

A. "Rough and Ready," "Winfield Scott," and "Maggie Hartman."

Q. When you say the "Bernard" do you mean the "Francis E. M. Bernard"?

A. That is the one.

Q. How long were you on the "Francis E. M. Bernard"? How long were you on her altogether?

A. Two years and a half.

Q. Do you remember the time that she sunk or got water-logged on the Sacramento River—on some tributary to the Sacramento River?

A. Well, it was in Cache Creek.

Q. What kind of a cargo did she have on her at that time? A. She had a lot of beans on her.

Q. How much beans?

A. 900 sacks, 45 tons supposed [76] to be.

Q. Where did you get the beans?

A. Miner Slough.

Q. What place?

A. Well, the first place I don't remember—it is Stollman or something like that; but I know the second place, Totman's. We had 450 sacks of beans from the upper place and 450 the other remainder from Totman's.

Q. Where were they loaded on the vessel; that is, in what parts of the vessel were they put?

A. Well, I put 125 sacks down in the after-hold

(Testimony of Paul Ewald.)

and the remainder on deck.

Q. Was she loaded properly at that time?

A. She was. She was in good trim.

Q. The usual way of loading cargo of that kind?

A. Exactly.

Q. And at that time?

Mr. FRANK.—We will not have an opportunity of having this before the Court, and I suggest that you do not lead the witness.

Mr. HUTTON.—Q. After you loaded the last part of those beans where did you go to?

A. Well, we set sail Monday morning. We pulled across the river and there was a westerly wind blowing. We set the mainsail and jib and we started off for home and I told the man to go forward and hoist the foresail, and a puff of wind came up from the northwest—the winds are pretty uncertain up the river. I had the helm hard down and she sheered and went into the bank there and struck a snag there or a rut and she made a hole in her starboard bow.

Q. What was the result?

A. It was no one's fault.

Q. What was the result of the hold in her?

A. The snag [77] was sticking out from the bank.

Q. What effect did that have on the ship?

A. It stove in the planking between the ribs.

Q. What happened?

A. We sheered her off and I noticed she acted funny and I tried to get on the other side but before we got there she turned over.

(Testimony of Paul Ewald.)

Q. What made her turn over?

A. The water got in the hold.

Q. She filled with water?

A. She filled with water and capsized.

Q. How was she before that, tight?

A. In good condition, she was only fixed up. Mr. Fernandez kept the boat in good shape.

Q. At the time you got the last part of those beans on what was the condition of her rigging, good or bad?

A. The condition was good; the boat was in good condition.

Q. What was the condition of her sails?

A. Good.

Q. And the hull? A. The hull was good.

Q. Where were you going to take those beans to?

A. They were going to the seawall to some party consigned—I don't know the consigner of the beans.

Q. The seawall where? A. Section two.

Q. What city, what place? A. San Francisco.

Q. Now, at the time you started on that trip, Captain, after you had loaded the beans just state the general condition of the hull and the rigging and the sails.

A. Well, the hull was in good condition, she was only lately fitted out on Anderson's ways.

Q. Did she leak any?

A. No, sir, she did not leak. The sails and the rigging were perfectly good in that boat. [78]

Q. Now, where had you left to go up the river? Did you leave San Francisco or some other place to

(Testimony of Paul Ewald.)

get up where you were?

A. We left San Francisco here with a lot of posts.

Q. Where for?

A. Rio Vista. We left here on Friday afternoon. We got to Rio Vista Saturday morning.

Q. What kind of a crew did she have on when she left San Francisco. How many men?

A. Two men.

Q. Who were the two?

A. The man I hired the day before and myself.

Q. What were you on her?

A. I was master of the boat.

Q. How many men did she usually carry? How many men did she usually carry while you were in her altogether? A. Only two all the time.

Q. During the two years you were on her?

A. Always two men.

Q. During that period of time that you were on her prior to this trip where did she run?

A. All over the place here. We used to go up the river, Sacramento River, San Joaquin River, up to Fernandez, like all the scows running in the bay; all over the country.

Q. Was she running in the same water at the time of this accident? A. The same waters.

Q. The same number of crew? A. Yes, sir.

Q. When she left San Francisco with a load of posts what was the condition of the vessel?

A. She was in good shape. The captain's name was Ed. Murrel before me.

Q. Did she leak any? A. No, sir.

(Testimony of Paul Ewald.)

Q. Tight? A. She was tight.

Q. What was the condition of her hull as to strength? A. Do you mean the planking? [79]

Q. Yes.

A. The planking is three inches; 2½ inches, I believe.

Q. What I meant, was she a strong boat or a weak boat?

A. She is always considered a strong boat for her size.

Q. What was the condition of her rigging and sails?

A. The rigging was good, real good wire rigging. The masts were good and firm and the sails were good.

Q. How wide a place was it there where she struck this snag?

A. Cache Creek is about 150 feet wide; from 150 to 175 feet.

Q. When she struck at that time did she strike a very hard blow?

A. Well, we was sailing pretty nicely with a leading wind and of course as soon as the wind hauled from the northwest it filled the mainsail and she took a sheer right into the bank although I had her helm hard down.

Q. Why did you have her helm hard down.

A. To sheer her off; I could see she was going to windward. I put her hard down.

Q. What I mean is did she strike a very hard blow?

(Testimony of Paul Ewald.)

A. She struck a glacing blow and then she sheered off.

Q. You say she keeled over; did she turn completely over?

A. After she struck I know she acted funny right away and I says to this man there must be something the matter with her. He says, "I cannot see nothing the matter with her." I tried to get her across the river to see what the trouble was with the boat and before we got halfway she turned turtle and I had just time enough to lower down the mainsail, foresail, and the jib. Of course, at that time the man and I was overboard; the deck-load shifted, the beans shifted, dumped over in the water. Of course, we was spilled into the water and the man [80] and I, we swam for the shore.

Q. I will ask you this; from your experience as a marine man was there anything you could have done at that time to avoid the accident?

A. It could not have been avoided. Them scows more or less sometimes they will act very contrary. You can have your helm hard up and hard down and they will act contrary.

Q. How is the wind on that creek—will it blow steadily?

A. No, sir; the winds are pretty uncertain. You get amongst a bunch of trees and a puff of wind comes up and all at once it is calm again. You will always have to be on the alert.

Q. This is a sailing vessel? A. Yes, sir.

Q. Is not any sailing vessel liable to act contrary

(Testimony of Paul Ewald.)

when the wind changes suddenly?

A. They will act contrary when the wind changes.

Q. I will ask you this: How is it with any sailing vessel when the wind changes suddenly, or comes in puffs such as you got on that morning?

A. Well, we went out and I told the man to slack—

Q. (Intg.) That is not the question. Read the question, Mr. Reporter.

(The Reporter reads the question.) How are they liable to act?

A. Some of them will pay off, some of them will luff up to the wind.

Q. What did the "Francis E. M. Bernard" do that morning, pay off or luff up.

A. She luffed up she went right to windward.

Q. How long had you had your mainsail set at the time that she struck the bank?

A. About half an hour.

Q. And you had been setting your foresail?

A. Yes, sir, [81] setting the foresail.

Mr. HUTTON.—I think that is all.

Cross-examination.

Mr. FRANK.—Q. Now, Mr. Ewald, did you make any memorandum of the amount of beans that you took on board? A. No, sir, I did not.

Q. When you say 900 or 960 sacks you are only attempting to approximate the amount?

A. Approximate; it is supposed to be 45 tons and 45 tons make about 900 sacks.

Q. Now, I show you here a receipt. Do you know this man Siguno? A. No, sir, I do not know that.

(Testimony of Paul Ewald.)

Q. A Jap? A. No, sir.

Q. Do you remember getting 671 sacks from one lot? A. That might have been possible.

Q. And 337 from another lot?

A. I don't know the lots, sir. I made no memorandum of the sacks I got. We loaded in two places.

Q. You would not say then that 1008 sacks is not probably what you had on board there?

A. It might have been possible.

Q. About 1008 sacks?

A. Yes, sir. It might have been possible. I do not know—that is right too. It must have been 1,000 sacks because there is 900 pounds to a sack and 1,000 sacks make 90,000 pounds or 45 tons.

Q. You did not weigh them with respect to tonnage? A. No, sir.

Q. So when you say you are supposed to have 45 tons what do you base that on?

A. Mr. Stern said to me there was 45 tons of beans on the river and I was to be paid for 45 tons. I did not [82] know the amount, or the number of the sacks.

Q. Now, you loaded at two places? A. Yes, sir.

Q. Where was the first place?

A. That I cannot recall. I cannot recall his name, but it was something like Stollman or Scollman. I don't recall his name.

Q. Was that the Miner Slough? A. Yes, sir.

Q. Further up? A. Further up.

Q. I show you a drawing here and ask you if that is not a fairly accurate diagram of Miner Slough and

(Testimony of Paul Ewald.)

Cache Slough at the point where this happened?

A. I think Miner Slough runs more north.

Q. Just make it the way you think it is. Put it right on here your way.

A. I think Miner Slough would run more north, about three or four points more north, or northeast. Northeast and southwest.

Q. This would be your idea then of Miner Slough?

A. Yes, sir.

Q. We will mark that Miner Slough B, and we will call the other Miner Slough A, the way I gave it to you first. Now, you think Miner Slough B is about the way—

A. That is the way I think it runs, northeast and southwest.

Q. How many tons did you take on at the first point of loading?

A. I don't know, sir, the amount of tons.

Q. How many sacks?

A. I know there was a gentleman there and he says, "You will take all the beans that is on the bank," and I says, "All right." I went to work that Saturday evening and put 125 tons down in the hold.

Q. Tons or sacks?

A. Sacks—125 sacks not tons.

Q. 125 sacks you took at the first place of loading and what did you do with them?

A. I put them down in the after [83] hold.

Q. What did you have in the forward hold?

A. Nothing.

Q. Nothing? A. No, sir.

(Testimony of Paul Ewald.)

Q. Of those 125 sacks how many tiers were they piled in the after hold?

A. We just leveled them off; we had them three high.

Q. And how far forward did they go?

A. They go up to the aft mast.

Q. From here (pointing)?

A. From the cabin bulkhead.

Q. How far was the cabin bulkhead from the stern of the vessel?

A. You mean from the aft hatch, or from the stern of the vessel. You see, here is the bulkhead of the cabin, here comes the hatch and here is the main-mast.

Q. The after hatch was right up alongside of the after cabin, was it not?

A. Exactly; just about three feet from the cabin.

Q. And the after cabin was how many feet long? It ran clear to the stern, did it not?

A. No, sir, the cabin was about eight feet long and there are about seven or eight feet more to the stern.

Q. But she is a scow and she had a slant stern, did she?

A. She was a schooner-built scow with a running stern, a sharp stern like a sailing vessel. She was not a flat-bottom boat; she was a schooner-built boat.

Q. That is she had a sharp bow?

A. Sharp bow and running stern.

Q. How far was it from the aft mast up to her bow?

A. From the after mast to her bow, about 25 feet.

(Testimony of Paul Ewald.)

Q. And the full length of the vessel was what?

A. 45 feet. 45 or 46 feet. [84]

Q. You say you stowed the beans three high? Of course, if she had a sharp bottom you would not be able to stow it clear across three high?

A. Yes, sir; I stowed it clear across; her run don't commence until about halfway from the cabin, then her run commences. That is how the cabin is built, so that you will not lose no space in the whole cabin. It is right from where her run commences so you will not lose any space.

Q. What was the depth of the hold from the main deck down to the bottom?

A. From the main deck to the timbers, four feet.

Q. Are you giving these measurements by estimate or how? A. By estimate.

Q. When did you make the estimate?

A. A sailor, he generally don't measure a boat; he just goes by sizing the boat up. The hold might have been six inches deeper.

Q. Now, you came down with that 125 sacks in your hold from the upper landing place to the lower landing place, did you?

A. No, sir; we had some more beans left there on the landing which we put on the after deck.

Q. How many beans did you have there?

A. Just the remainder, what was left on the bank. I don't know how many sacks there was on the upper place, but I put 125 sacks down in the hold and the remainder went on deck.

(Testimony of Paul Ewald.)

Q. When you came down Miner Slough did you sail down?

A. Sunday morning I was pulled down by a horse and wagon to Totman's place.

Q. That is at the very end of Miner Slough where it goes into Cache Slough? A. Yes, sir. [85]

Q. Then you took the rest? A. Yes, sir.

Q. How many beans do you think you took?

A. Whatever was on the bank. There was a man who came down there and says, "Here is the beans," and I says, "All right."

Q. And those were also put on the upper deck?

A. Yes, sir.

Q. How many tiers high were they stowed on the deck? A. Five high.

Q. Was not there a third man there at the time you loaded these beans and who belonged to the vessel?

A. A third man?

Q. A third man? A. Only two men.

Q. Only yourself and one?

A. The other man the mate.

Q. You call him the mate?

A. Well, mate and cook; he is everything there; bottle-washer, deck-hand.

Q. How many masts did this vessel have?

A. Two.

Q. And you carried a mainsail and foresail and one jib? A. Yes, sir.

Q. Now, I understand that you hoisted your mainsail when you started out from Miner Slough?

A. Yes, sir.

(Testimony of Paul Ewald.)

Q. And you were sailing with the mainsail down the slough?

A. We had just started; we had a jib hoisted home-ward-bound and I told the man to go forward and hoist the mainsail; in the meantime the wind shifted from the northwest, filled in the mainsail and she took a sheer and went in the bank—

Q. Wait a minute. You had a jib then and mainsail up? A. Yes, sir, hoisted.

Q. And you were at the wheel?

A. I was at the wheel.

Q. On which side was your mainsail at this time?

A. It was, I believe, on the starboard tack. [86]

Q. That is, you were going down and the wind was coming over your right side and the sail was over the left? A. Yes, sir.

Q. And you were coming straight across the creek?

A. Yes, sir, sort of leading wind, not exactly three sheets.

Q. And then you say the wind hauled around to the northward? A. No, to the northwest.

Q. To the northwest? A. Yes, sir.

Q. Before that it had been coming from the west?

A. Westerly.

Q. How long did it take it to haul to the northwest? A. It seems to come in a puff.

Q. That is all, just one puff?

A. Yes, sir; I had to put the helm hard-up; she would not sheer up; she just keep on going.

Q. And your mainsail was jibbed?

(Testimony of Paul Ewald.)

A. No, sir; I had her going out; the main sheet was slacked away.

Q. That is, you had to leave your wheel to get to the main sheet? A. I lashed the wheel down.

Q. And ran over to the main sheet to ease her out?

A. Yes, sir.

Q. And at that time the other man was forward trying to raise the foresail; is that right?

A. Exactly.

Q. How long did it take you to let go of your main sheet?

A. Only just two minutes, less than two minutes.

Q. By the time you had let go of your main sheet were you in the bank?

A. No, sir, but the wheel was hard-up. She took a sheer then.

Q. She took a sheer again?

A. When the puff of wind came I had the wheel hard-up. I lashed the wheel. She was coming [87] toward the bank.

Q. She sheered up, then, before you left the wheel?

A. Yes, sir.

Q. And before you got back she was in the bank?

A. Yes, sir.

Q. How far was the point where she struck the bank from the mouth of Miner Slough?

A. 200 feet, I guess.

Q. 200 feet? A. Yes, sir.

Q. Then, as a matter of fact, Captain, you were coming down Miner Slough in a westerly direction, weren't you? A. Yes, sir.

(Testimony of Paul Ewald.)

Q. And it was necessary, then, for you to come around to the southward, was it not? A. Yes, sir.

Q. And you were doing that, were you not, before this thing happened? A. Yes, sir.

Q. Were you already on the southerly course when this thing happened?

A. We were already on her southerly course.

Q. Were you in the middle of the stream?

A. About over here, sir, about there.

Q. When you say about there, what do you mean by that? A. Somewheres around there.

Q. Mark with the line there an arrow.

A. You must understand when we pulled out—

Q. (Intg.) Let us get this first. Is that right where the arrow is? A. Yes, sir.

Q. Going on that course? A. Yes, sir.

Q. You had plenty of room, did you not, then, to go down the slough in that position?

A. Plenty of room.

Q. Just mark there about in what angle your mainsail was. Mark at what angle your mainsail was at that time, just as though that was the boat.

A. Yes, sir. [88]

Q. The mainsail was out like that? A. Yes, sir.

Q. We will call that C-D, the position of the mainsail. Is that right? A. That is right.

Q. Now, Captain, the wind, then, at that time, was in the direction of the arrow E-F, was it not? That was westerly? A. Yes, sir.

Q. That was the way you were sailing?

A. Yes, sir.

(Testimony of Paul Ewald.)

Q. Now, you say the wind came around a little to the northward? A. To the northwest.

Q. Just mark with an arrow up here about how the wind changed. A. Yes, sir.

Q. E-F, G-H. The wind had changed, then, to the direction G-H. That is right? A. Yes, sir.

Q. About the same strength of wind as you were having from the E-F direction?

A. About the same strength.

Q. That was pretty nearly dead aft, was it not?

A. Almost aft.

Q. Then you say the vessel sheered towards the right; towards the right bank?

A. Yes, sir, she luffed up to the bank.

Q. And then you ran forward and let go the sheet so as to throw your mainsail out in this direction?

A. Yes, sir.

Q. In the direction D-K. That is what you did?

A. Yes, sir.

Q. Then what did she do?

A. Then she sheered in to the bank.

Q. About where did she strike the bank? Mark the place on that paper.

A. About like this. She sheered there and then she sheered off.

Q. Then she went in the direction of the continuous line ending with an arrow head at L. Is that right? That is, she went there and struck the bank at the point you have marked and then out in the direction like that? Is that right? [89]

[Answer omitted in original certified typewritten Record.]

(Testimony of Paul Ewald.)

Q. Don't you think that if instead of letting go your main sheet you had hauled it and jibed your mainsail such a thing could not have happened?

A. No, sir.

Q. Why?

A. As the wind is blowing from here, if I would have jibed the mainsail she would have all the more come in the bank. She would have come head on.

Q. And you think that is what she would have done? A. Yes, sir.

Q. How do you know there was a snag or anything at the bank?

A. I did not know there was a snag.

Q. How did you know afterwards; did you ever go and examine the place. A. I did not.

Q. You are just guessing.

A. By the hole in the schooner there must have been a snag. Because Cache River is deep from bank to bank.

Q. How high up was the hole in her, if you know?

A. It was in the side, sir.

Q. How far below her rail?

A. She was just about four, five or six inches below the water-line; that is, below the water.

Q. You mean when she was on an even keel?

A. Yes, sir, when she was on an even keel.

Q. How long did you sail after that before she capsized?

A. We struck the bank there and she sheered off, and then the mainsail jibed and all the remaining sails jibed and just about there where the arrow is—

(Testimony of Paul Ewald.)

I was halfway across, she turned over.

Q. As quick as that?

A. Yes, sir, she jibed over quick.

Q. Then she turned over almost immediately after she struck? A. Almost. [90]

Q. There was no appreciable time between the time of striking and upsetting?

A. No, sir; five minutes.

Q. The river is about 150 feet wide there and you probably went 50 feet from the bank when you upset? A. Yes, sir.

Q. And you were coming pretty quick at that time, weren't you?

A. From the place it did not take any time.

Q. It must have been a few seconds.

A. Five seconds, I should think.

Q. Would it take you five minutes to go 50 the way you were going then?

A. I had time to lower the mainsail, foresail and the jib; I let go the helm and they dropped right off.

Q. They dropped right off?

A. That is all the time I had.

Q. You did it yourself or the other man?

A. I told him to let go the jib.

Q. He was there? A. Yes, sir.

Q. And you let go the mainsail?

A. The mainsail and foresail.

Q. The foresail was not up, was it? A. Yes, sir.

Q. And before they were down she was over?

A. Yes, sir.

Q. So you don't know, as a matter of fact, whether

(Testimony of Paul Ewald.)

she filled with water, or what actually happened. All you know is as soon as she struck the bank you dropped the sails and by the time you had them dropped she turned turtle? That is all you know about it? A. Yes, sir.

Mr. FRANK.—We will offer this diagram in evidence and ask that it be marked Libelant's Exhibit "A."

(The diagram is marked Libelant's Exhibit "A.")

Q. Where is this other man?

A. I don't know, sir.

Q. What was his name?

A. I don't know his name, either.

Q. How long had you been sailing with him?

A. He has been [91] with me only three days.

Q. At that time? A. Yes, sir.

Q. What are you doing now on the "L. Aguador"?

A. I am deck-hand there.

Q. Deck-hand? A. Yes, sir.

Q. And between the time of this accident and the present time what have you been doing?

A. I have been sailing.

Q. Before the mast? A. Yes, sir.

Q. As deck-hand?

A. I have been doing longshore work for a year and I have been sailing in scows. I had the "Maggie Hartman" for Scott, Wagner and Miller. I was running the "Rough-and-Ready" for Harry Tietzen, and the "Wingfield Scott."

Q. That is all since the accident to the "Francis E. M. Bernard"? A. Yes, sir.

(Testimony of Paul Ewald.)

Q. The "Francis E. M. Bernard" was the first boat you ever ran?

A. Yes, sir, that is as master.

Q. You were deck-hand before that all the time?

A. Yes, sir.

Q. Do you know how old the "Francis E. M. Bernard" was at that time?

A. No, sir; I do not know in what year the boat was built.

Q. You say she had been fixed up shortly before that. Did you have anything to do with fixing her up?

A. Yes, sir; I was there, that is when Captain Murrel was there; I always was up there at Anderson's ways.

Q. What did they do to her then?

A. They put new planking in her.

Q. What planks? A. New planks.

Q. Outside planks? A. Yes, sir.

Q. For the whole vessel?

A. No, sir, just where it was necessary. [92]

Q. How many planks did they put in her?

A. I don't know, sir.

Q. You have no idea? A. No, sir.

Q. I suppose her planks were rotten and they had to remove them?

A. Some of them; wherever it was necessary they had new planks.

Q. Because it was rotten?

A. The boat was like any other boat, it needs fixing.

(Testimony of Paul Ewald.)

Q. You answer my question, if you know. It needed fixing because her planking was rotten? Is that so? A. Yes, sir.

Q. Is that all they did to her is to put new planking in her? A. Yes, sir, that is all.

Q. And you don't know how many planks were put on her—

Mr. HUTTON.—(Intg.) You were going to say something; what was it?

A. (Contg.) After the planking is in you have to caulk the planks.

Q. That is, caulk her where the planks were put in? A. Yes, sir.

Q. You do not mean they caulked her generally, but just in the particular seams where the planks were put in her? A. Yes, sir.

Q. And that is all? A. Yes, sir.

Q. And what had been done to her previously to that you do not know anything about what had been done to her before that? A. No, sir.

Q. And you do not know of any other repairs made to her?

A. Yes, sir; they were making repairs almost every six months to that boat.

Q. Were you present? A. Yes, sir.

Q. What other repairs did they make on her that you saw? [93] A. Fixing up the prick-posts.

Q. What is a prick-post?

A. That is between the center-board casing. Here is the prick-post here and forward where the center-board runs in the casing.

(Testimony of Paul Ewald.)

Q. That is the fore and aft ends of the center-board casing? A. Yes, sir.

Q. Did they fix that up?

A. Yes, sir, they had them fixed.

Q. What was the matter with them?

A. The center-board casing got rotten and they put a new one in.

Q. Anything else? A. No, sir.

Q. That is all that you remember of the repairs that had been made in her? A. Yes, sir.

Q. You said something about a scow will act contrary, sometimes they will not handle. What do you mean by that?

A. You can have your helm hard up or hard down and the boat will not answer her helm.

Q. Why?

A. For some reason when I was in the "Rough-and-Ready" the same thing *the same thing* happened; I had her helm hard down leaving the dock and she would not come to the wind.

Q. Had you experienced this difficulty with the "Francis E. M. Bernard" where she would not answer her helm? A. If a boat—

Q. I am asking you about the "Bernard" now.

A. Yes, sir.

Q. You had that difficulty with her before?

A. Yes, sir; when a boat runs speedy she will not answer very quick.

Q. Answer my question; did you have trouble with the "Bernard" in not answering her helm very subsequently before this time? A. Yes, sir.

(Testimony of Paul Ewald.)

Q. And you don't know what the reason is?

A. No, sir. [94]

Q. And you think the accident really happened this time because she would not answer her helm?

A. Yes, sir.

Q. Did you ever see the boat after the accident?

A. No, sir.

Q. Don't you know what became of her at all?

A. Yes, sir, she is over at the landing.

Q. She is over at the landing? A. Yes, sir.

Q. What landing? A. Pinole.

Q. Now? A. Yes, sir.

Q. How long has she been there?

A. She has been there ever since she was towed down.

Q. She has never been used since the accident?

A. No, sir.

Q. Have you seen her there?

A. Yes, sir; she is lying there.

Q. How do you know she has been there ever since the accident?

A. The boat has never been in the bay since. The only way I have seen the boat is when I have been up by there in the train.

Q. That is all you know about it?

A. Yes, sir; that is all I know about the boat.

Q. How often have you been up there in the last five or six years? A. Seven or eight times.

Q. Pinole,—that is the place where Fernandez lives? A. Yes, sir.

Q. That is the home port, if I might use that term?

(Testimony of Paul Ewald.)

A. That is the home port.

Q. Did you have any liquor on board that time?

A. No, sir.

Q. No liquor on board? A. Not a drop.

Q. Did you have any liquor on shore?

A. No, sir.

Q. You had not been drinking at all?

A. No, sir.

Q. Had the man that was with you been drinking?

A. No, sir, not that I know of. [95]

Q. Of course, there was nothing the matter with those beans when you took them on board. They were all in good condition?

A. The beans were in good condition. I don't know if they were old or new. It does not matter to me; I don't know much about beans as long as I had them on.

Redirect Examination.

Mr. HUTTON.—Q. Do you know whether any water ran into the hold of the "Francis E. M. Bernard" after she struck the bank at that time?

A. There must have been water run into the hold.

Q. Did she sink?

A. No, sir, she did not sink; she turned over, turned turtle.

Q. Completely over? A. Completely over.

Q. Was that when you saw the hole?

A. No, sir; we did not see the hole until after she was raised.

Q. You saw it then? A. Yes, sir.

Q. How big a hole was it?

(Testimony of Paul Ewald.)

A. It was a hole between two timbers. It could not have been very big, that snag, and it seemed to strike the boat right between the timbers. Of course, I guess I could have put my hand through the hole.

Q. What can you say as to that hole; was it made by striking a soft or hard substance?

A. A hard substance.

Q. That is the result, you think? It would be caused by striking a snag, some hard substance?

A. Yes, sir.

Q. You stated you had your helm hard down?

A. Hard up.

Q. What effect would that have of throwing her on to the bank or off the bank? A. Off the bank.

Q. This man that you had, was he an average man for that work?

A. He has been scowing down the bay. I have seen him time [96] and time on Meiggs' wharf, and I shipped him. After that time I think he went to Seattle. He is a Seattle man. He told me he was going to Seattle to see his folks.

Q. Did the "Francis E. M. Bernard" act any different than any other boat would act in the quick change of the wind?

A. Any other scow would have done the same thing with that puff of wind; it was almost impossible to keep her off the bank.

Q. Did she steer as well as the average scow would steer? A. Like any other boat.

Q. You stated she would not answer her helm?

A. There are times they will act contrary. Many

(Testimony of Paul Ewald.)

times you get in a tide rip and a scow will not handle.

Q. That is caused by the tide rip? A. Yes, sir.

Q. No vessel will handle in the tide rip?

Mr. FRANK.—Don't lead the witness.

A. She must be a very sharp vessel, and a change of wind will affect the vessel.

Recross-examination.

Mr. FRANK.—Q. I thought you told me you never saw that hole? A. After she was raised.

Q. Where was she when you saw it?

A. I saw it in Rio Vista at that time.

Q. Where was the vessel when you saw it?

A. When I saw the hole?

Q. Yes. A. She was in Rio Vista.

Q. She was raised and brought to Rio Vista?

A. She was raised and towed down to Pinole.

Q. And after she was raised you saw her in Rio Vista? A. Yes, sir. [97]

Q. Was she pumped out?

A. Yes, sir, she was pumped out then.

Q. How did she come down, sail down?

A. No, sir, towed down.

Q. And you say it was a little bit of a hole in her side that you think you could get your hand through?

A. Yes, sir.

Q. And that was all the damage that was done to her? A. Yes, sir. [98]

**[Certificate of U. S. Commissioner to Testimony
Taken Under Order of Reference.]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that in pursuance of the order of reference to take and report the testimony herein, that on Wednesday, March 26th, 1913, I was attended by Nathan H. Frank, Esq., as proctor for the libelant, and H. W. Hutton, Esq., proctor for respondent, and by the witness Paul Ewald, who was of sound mind and lawful age, and that the witness was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in said cause; that the foregoing testimony was taken in shorthand by Herbert Bennett, and afterwards reduced to type-writing, pursuant to such order of reference.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 28th day of May, 1913.

[Seal]

FRANCIS KRULL,

U. S. Commissioner, Northern District of California,
at San Francisco. [99]

(LIBELANT'S EXHIBIT "A" is here inserted in the original transcript of testimony taken before United States Commissioner.)

[Endorsed]: Filed Feb. 27, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [100]

[Record of Hearing, Saturday, November 1, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 1st day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#13,495.

J. STERN et al.

vs.

CARLOTTA C. FERNANDEZ et al.

The motion for leave to make additional proofs herein this day came on for hearing, H. W. Hutton, Esq., appearing for defendant and Nathan Frank, Esqr., appearing for libelant. An amended libel was then filed and allegation as to presentment of claim denied for want of information. Mr. Hutton recalled B. H. Tietjen for further examination, and the case was then continued for five days for libelant to put in evidence in rebuttal. [101]

[Title of Court and Cause.]

Amendment to Libel.

To the Honorable the District Court of the United States in and for the Northern District of California, Division One.

Upon leave of Court first duly had, the libelants

hereby amend their libel in the above-entitled cause by alleging as follows:

I.

That at all the times in said libel mentioned, said B. Fernandez was the owner of said schooner "Francis E. M. Bernard."

II.

That heretofore, to wit, on the — day of —, 19—, the said libelants duly presented their claim for the matters and things in said libel set forth to Carlotta C. [102] Fernandez and Thomas B. Fernandez, the executrix and executor of the estate of said B. Fernandez, deceased, and that the said claim was thereafter rejected by said executrix and executor.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Libelants.

State of California,

City and County of San Francisco,—ss.

J. Stern, being duly sworn, deposes and says: That he is a member of the firm of J. Stern & Co., libelant in the above-entitled cause; that he has read the foregoing amendment to libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

J. STERN.

Subscribed and sworn to before me this 1 day of November, 1913.

[Seal]

CHARLES EDDMAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires April 9th, 1914.

[Endorsed]: Filed Nov. 1, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [103]

[Title of Court and Cause.]

Opinion.

NATHAN H. FRANK and IRVING H.
FRANK, Proctors for Libellant.

H. W. HUTTON, Proctor for Defendants.

In October, 1904, libellant shipped on board the schooner "Francis E. M. Bernard," belonging to and operated by respondents' testate, 1008 sacks of beans, to be carried from a point on the tributary of the Sacramento River to San Francisco. The "Bernard" ran into a snag on the bank which made a hole in her bow, through which water entered and shortly thereafter she turned over and sank and the cargo was lost.

Respondents claim that the loss was due to perils of navigation, and that the "Bernard" was in all respects properly fitted and manned. The testimony of respondents' witnesses support in every respect their claim. But libellant argues that no sufficient peril of navigation is shown, and that the manner of the accident itself, on the theory of *res ipsa lo-*

quitur, shows that she could not have been properly manned and [104] fitted, that the cargo must have been improperly stowed. Testimony was also presented by both parties as to whether or no the cargo was in fact properly stowed.

Upon the whole case I am inclined to the view that respondents have sufficiently accounted for the accident to relieve them from responsibility therefor.

Judgment will therefore be entered in their favor.
December 5th, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 5, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [105]

[Decree Dismissing Libel.]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY—No. 13,495.

J. STERN et al., etc.,

Libelants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS B.
FERNANDEZ, as Executrix and Executor
of the Last Will of B. FERNANDEZ, De-
ceased,

Respondents.

This cause having been heard on the pleadings and proofs, and due deliberation being had in the prem-

ises, it is now ordered, adjudged and decreed, by the Court, that for and in consideration of the matters and things set forth in the pleadings, and shown by the proofs herein, that libellants take nothing from the respondents, but that the libel herein be, and the same is hereby dismissed, and that respondents have and recover their costs herein to be taxed.

Dated, December 15, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 15, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [106]

[Title of Court and Cause.]

Notice of Appeal.

To Carlotta C. Fernandez and Thomas B. Fernandez,
Executrix and Executor of the Last Will and
Testament of B. Fernandez, Deceased, Respond-
ents Above Named, and to H. W. Hutton, Esq.,
Their Attorney:

PLEASE TAKE NOTICE, that J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Company libelants in the above-entitled cause, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of the District Court of the United States, in and for the Northern District of California, entered in said cause on the 15th day of December, 1913, and from the whole of said decree.

Dated, February 19th, 1914.

NATHAN H. FRANK,
IRVING H. FRANK,

Proctors for Libelants. [107]

Receipt of a copy of the within Notice of Appeal is hereby admitted this 19th day of February, 1914.

H. W. HUTTON,

Proctor for Respondents.

[Endorsed]: Filed Feb. 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [108]

[Title of Court and Cause.]

Assignment of Errors.

Now come J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Co., libelants in the above-entitled cause, and assign the following errors in said cause, to wit:

1. The Court erred in finding that the loss of the beans in question was due to perils of navigation.

2. The Court erred in finding that the "Francis E. Bernard" was in all respects fitted and manned.

3. The Court erred in finding that the "Francis E. Bernard" was seaworthy at the time of commencing the voyage in question.

4. The Court erred in finding that the said vessel was properly manned. [109]

5. The Court erred in finding that the respondents have sufficiently accounted for the accident to relieve them of their responsibility therefor.

6. The Court erred in failing to find that the loss of said beans was due to the negligence and careless-

ness of the said respondents.

7. The Court erred in ordering the dismissal of said Libel.

8. The Court erred in failing to enter a decree in favor of libelants for the damages sustained by them by reason of the loss of said beans, together with interest and costs.

Respectfully submitted,
NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelants.

[Endorsed]: Apr. 20, 1914. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [110]

[Title of Court and Cause.]

**Order Extending Time to File Apostles on Appeal
and Assignment of Errors.**

Good cause appearing therefor, IT IS HEREBY ORDERED, that the libelant and appellant herein, J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Company, may have to and including the 10th day of April, 1914, within which to file the Apostles on Appeal and Assignment of Errors herein in the United States District Court of Appeals.

Dated March 31, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 31, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [111]

**[Certificate of Clerk U. S. District Court to Apostles
on Appeal.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed 111 pages, numbered from 1 to 111, inclusive, contain a full, true and correct Transcript of the records, as the same now appear on file and of record in the clerk's office of said District Court, in the cause entitled J. Stern and B. Fleischer, Partners Doing Business Under the Firm Name and Style of J. Stern & Co., Libelants, vs. B. Fernandez, Respondent, and numbered 13,495, and which said Transcript is made up pursuant to and in accordance with "Praecipe for Apostles on Appeal" (copy of which is embodied in said Transcript), and the instructions of Messrs. Nathan H. Frank and Irving H. Frank, proctors for libellants and appellants herein.

I further certify that the costs of preparing and certifying to the foregoing Apostles on Appeal is the sum of fifty-five dollars and sixty cents (\$55.60), and that the said sum has been paid to me by proctors for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of April, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [112]

[Endorsed]: No. 2409. United States Circuit Court of Appeals for the Ninth Circuit. J. Stern and B. Fleischer, Partners Doing Business Under the Firm Name and Style of J. Stern & Company, Appellant, vs. Carlotta C. Fernandez and Thomas B. Fernandez, Executrix and Executor of the Last Will and Testament of B. Fernandez, Deceased, Appellees. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed April 20, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the District Court of the United States in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 13,495.

J. STERN and B. FLEISCHER, Partners Doing
Business Under the Firm Name and Style of
J. STERN & COMPANY,

Libelants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS B.
FERNANDEZ, Executrix and Executor of
the Last Will and Testament of B. FERNAN-
DEZ, Deceased,

Respondents.

**Order Extending Time to [March 31, 1914, to] File
Apostles on Appeal and Assignment of Errors.**

Good cause appearing therefor, IT IS HEREBY ORDERED, that the libelant and appellant herein, J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Company, may have to and including the 31st day of March, 1914, within which to file the Apostles on Appeal and Assignment of Errors herein in the United States Circuit Court of Appeals.

Dated March 21st, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 31, 1914, to File Record Thereof and to Docket Case. Filed Mar. 21, 1914. F. D. Monckton, Clerk.

*In the District Court of the United States in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 13,495.

J. STERN and B. FLEISCHER, Partners Doing
Business Under the Firm Name and Style of
J. STERN & COMPANY,

Libelants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS B.
FERNANDEZ, Executrix and Executor of
the Last Will and Testament of B. FERNAN-
DEZ, Deceased,

Respondents.

**Order Extending Time to [April 20, 1914, to] File
Apostles on Appeal and Assignment of Errors.**

Good cause appearing therefor, IT IS HEREBY
ORDERED, that the libelants and appellants herein,
J. Stern and B. Fleischer, partners doing business
under the firm name and style of J. Stern & Com-
pany, may have to and including the 20th day of
April, 1914, within which to file the Apostles on
Appeal and Assignment of Errors herein in the
United States District Court of Appeals.

Dated April 10, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 11, 1914. F. D. Monckton, Clerk.

No. 2409. United States Circuit Court of Appeals for the Ninth Circuit. Orders Under Rule 16 Enlarging Time to April 20, 1914, to File Record Thereof and to Docket Case. Re-filed Apr. 21, 1914. F. D. Monckton, Clerk.

**[Stipulation that Title of Court and Cause be
Omitted from Captions in Printing of Record
on Appeal.]**

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

No. 2409.

J. STERN and B. FLEISCHER, Partners Doing
Business Under the Firm Name and Style of
J. STERN & CO.,

Libelants and Appellants,

vs.

CARLOTTA C. FERNANDEZ, Executrix, and
THOMAS B. FERNANDEZ, Executor, of
the Last Will and Testament of B. FER-
NANDEZ, Deceased,

Respondents and Appellees.

IT IS HEREBY STIPULATED by and between
the respective parties hereto that in printing the
record on appeal, the title of court and cause may
be omitted in all captions except that of the Libel
and of the Final Decree, and in lieu thereof, the

mere statement "Title of Court and Cause" shall be inserted.

Dated May 6, 1914.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Libelants and Appellants.

H. W. HUTTON,

Proctor for Respondents and Appellees.

[Endorsed]: No. 2409. In the United States Circuit Court of Appeals in and for the Ninth Circuit. J. Stern et al., Libelants and Appellants, vs. Carlotta C. Fernandez et al., Executrix and Executor, etc., Respondents and Appellees. Stipulation That Title of Court and Cause be Omitted from Captions in Printing of Record on Appeal. Filed May 9, 1914. F. D. Monckton, Clerk.